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ABSTRACT

This law-related education teaching resource calls attention to civil rights in the school. Julius Menacker gives an overview of major national school legislation and the federal courts' roles in the constitutional areas of equal protection, freedom of expression, and due process. Aggie Alvez offers new perspectives on the constitutional, economic, social and political implications of dress codes using several instructional formats including a mock school board hearing. A lesson plan designed by Stephen A. Rose provides tools to help students formulate and apply reasoned views of the Establishment Clause and its Supreme Court applications. Ralph D. Mawksley looks at important legal principles and precedents that have framed sexual harassment law and outlines a school harassment policy that will give students insights into preventive law. A lesson plan follows that presents sexual harassment laws and procedures to follow when harassment occurs, as well as tools to help students deal with this perplexing problem. Other articles explore the fairness of testing practices and the restrictive regulations intended to curb school violence. (JD)

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Special Issue!

School Law

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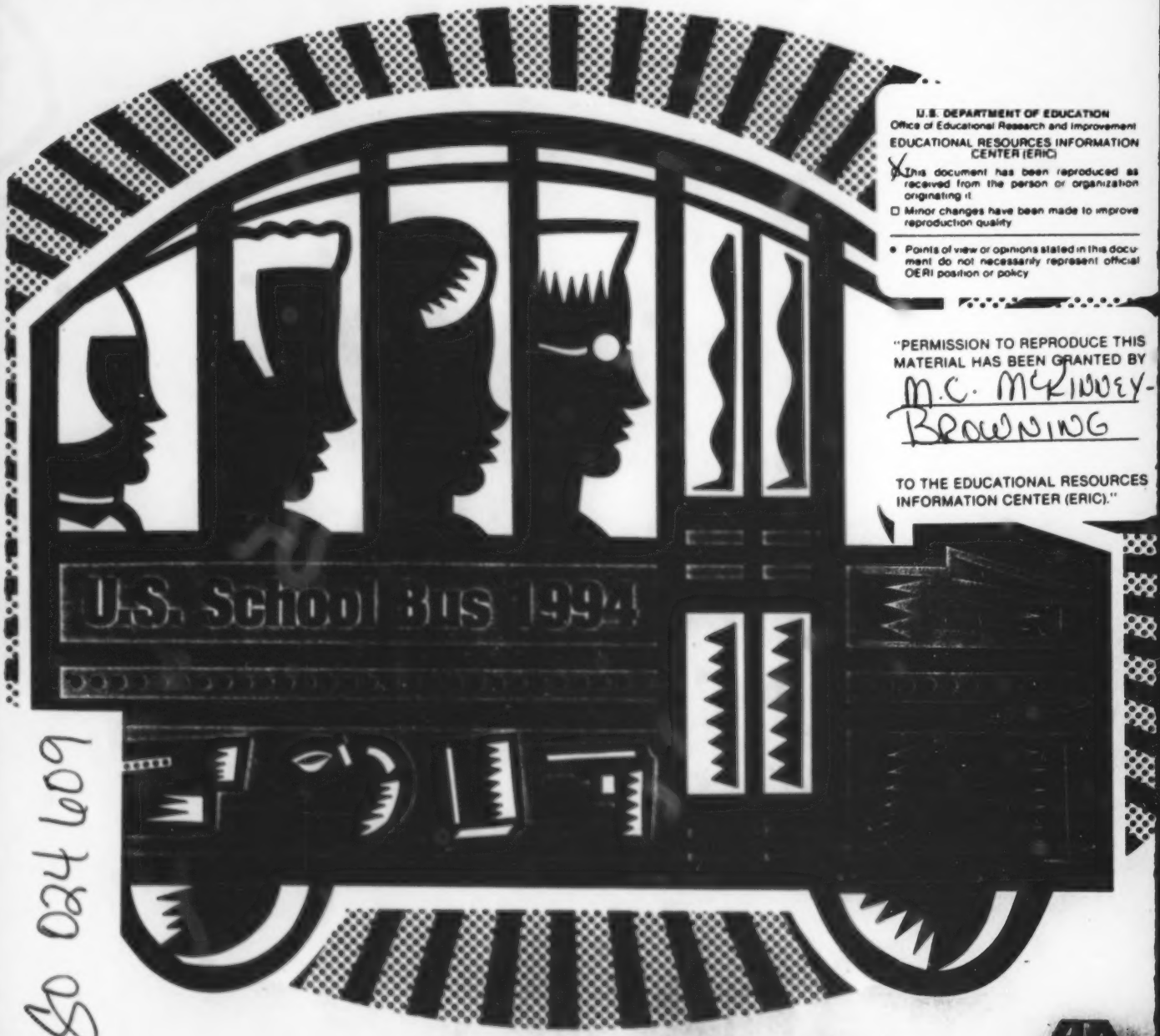

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School Law Issue

For LRE Teachers, Program Developers, and Resource People

What's Inside?

If somebody had told me in the sixties that we would have the problems we have today with drugs and guns, I would not have believed it.

So states Margaret Bush Wilson in her pictorial essay on *Brown* in this issue, encapsulating my feelings while putting it together for press. How do your school memories compare? I can recall a dress code that limited girls to one crinoline and boys to dress pants, no jeans. And then there was the drug problem—kids smoking in the bathroom. How about those fist fights teachers broke up by themselves, or detention for giggling in class during opening prayer? And, how embarrassing! Boys sat like crows on the schoolyard fence, waiting for girls to walk past so that they could sneak a whistle when the teachers weren't looking.

Some things will never change, of course. Teenage romance is one of them. But others seem gone forever. Today, students confront an intensity of violence and sexual harassment that were previously unknown to our nation's schools. In a word, the change is astounding. Another generation's hopes of making the nation's schools the best that they can be have not been realized. In fact, some problems have deepened, and others have been added, including perhaps the worst—guns. And one issue that seemed settled forever—the place of religion at school—is now confused as never before.

This issue of *Update on Law-Related Education* paints a disturbing picture of today's school environment. Yet, at the same time, it will help teachers and their students understand why that environment has changed, what the legal ramifications of their problems are, and how they might be able to reaffirm the possibility of attaining, and preserving, harmony and justice in the classroom.

Special thanks go to Julius Menacker—our guest editor—who accepted the task of producing this challenging edition. Characteristic of Julius, he did a splendid job of organizing the discussion and helping the contributors target educators' special needs. We appreciate his hard work and lifelong commitment to bettering our nation's schools.

Seva Johnson

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Update helps classroom teachers and law-related education program developers educate students about the law and legal issues. The views expressed in this document are those of the authors and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association, nor do they represent the official position or policies of the U.S. Department of Justice or the Special Committee on Youth Education for Citizenship.

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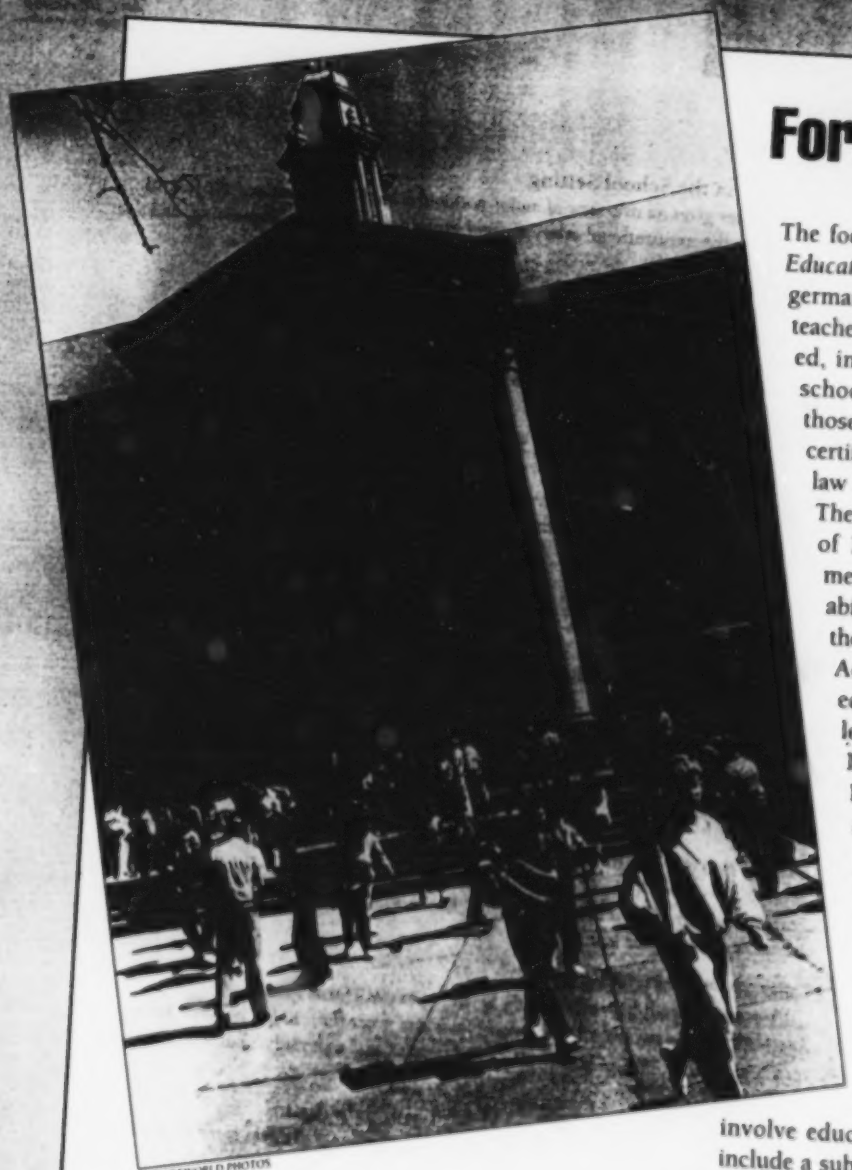

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Foreword

The focus for this issue of *Update on Law-Related Education*—school law—is one that is uniquely germane to the readers of this journal. Students, teachers, administrators, and parents are all affected, in greater or lesser degree, by the scope of school law, which includes state laws such as those affecting compulsory attendance; teacher certification; and required areas of study. School law is also found in national legislation such as The Elementary and Secondary Education Act of 1965, Title IX of the Education Amendments of 1972, and the Individuals with Disabilities Education Act of 1990 (superseding the Education for All Handicapped Children Act of 1975). Further legal influence on education is found in national civil rights legislation, such as the Civil Rights Act of 1964 and the Rehabilitation Act of 1973. Most important, several of the civil rights amendments to the U.S. Constitution have been applied to public education. These include First Amendment rights to religious freedom, free speech, and freedom of the press; Fourth Amendment privacy rights; and Fourteenth Amendment rights to due process and equal protection.

Because of the wide range of legislative and constitutional issues that involve education, state and federal court dockets include a substantial number of school-related cases. Indeed, the U.S. Supreme Court decision in *Brown v. Board of Education* (1954), in which the Fourteenth Amendment's Equal Protection Clause was interpreted to bar racial segregation in public education, stands as one of the most significant decisions in Supreme Court history. Other Supreme Court decisions have also stimulated wide interest and deep emotions. These include the decisions in the 1960s in which the Supreme Court barred prayer and Bible reading from public schools, and decisions that strongly enhanced student rights during the 1960s and 1970s. Similarly, recent court erosion of some of these student rights has produced strong feelings on both sides of the issues.

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In recent years, the scope of school law has expanded. Concerns such as school-related drug abuse, the rights of disabled students, school order and safety, and sexual harassment in the schools have given rise to new laws and the court decisions that interpret them. Also, many state courts have been forced to grapple with the issue of fiscal equity in school financing. Meanwhile, older school-law issues persist, such as the separation of religion from public education and the means to finally bring to fruition the promise of *Brown v. Board of Education*. The importance of schools was nowhere so powerfully put as in the position taken in the *Brown* decision that "Today, education is perhaps the most important function of state and local governments." Therefore, we can expect statutes and court decisions affecting schooling to continue to be an important area of law.

The articles in this issue address both traditional and relatively new sources of legal concern to schools. Margaret Bush Wilson's description of the circumstances surrounding *Brown* traces the wider societal issues that relate to race and equal opportunity in education, and we see how various national conditions, as well as international events, influenced the *Brown* decision. My review of civil rights in the school setting provides a broad framework for understanding how constitutional rights affect a wide range of educational issues.

David Schimmel's article addresses the church-state education controversy. He explains the issues that persist in this long-standing area of educational civil rights law. He also calls attention to the potential for an important policy shift in the manner in which the Supreme Court views the question of separation of church and state in public education. Ralph D. Mawdsley orients the reader to an emerging area of civil rights litigation that has application to schooling: sexual harassment. He explains how this area of law has gained increased court recognition, and he provides guidelines for how school policy can best avoid, as well as respond to, sexual harassment problems.

Carolyn Pereira deals with the relatively recent emergence of school violence as a critical issue, asking whether we can make our schools safe again. She tells us that the most efficacious approach to this end is to treat the disease rather than the symptoms. Pereira believes that, while increased violence is a societal phenomenon, the schools represent the best agency for contributing to a reversal of that trend.

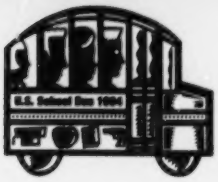
Theresa A. Thorkildsen provides a different approach in her article, which addresses student conceptions of fairness in school learning and testing practices. This perspective concerns the manner in which fairness and justice can be implemented in the classroom in ways that are consistent with principles of law.

The articles are complemented by recommended teaching strategies and exercises designed to enhance student understanding of, and appreciation for, the role of law in American society and, particularly, in school policy and practice. Accompanying Thorkildsen's article is a survey to detect student attitudes about fairness and justice in classrooms. Stephen A. Rose has developed strategies and exercises designed to capitalize on Professor Schimmel's presentation on legal issues involving religion and the schools. Aggie Alvez has done the same to deepen and broaden student understanding of Professor Mawdsley's discussion of sexual harassment, as well as my discussion of civil rights. Finally, Melissa Lumberg, Hilda Harris, and Charlotte Wager have developed a teaching strategy related to the control of weapons in school that is designed to help students better appreciate the complexities of legal policy-making and their role in solving problems.

All of us who are contributing to this issue do so in the belief that the schools represent the surest and best agency for developing a citizenry that is well-informed and respectful of the law.

We believe that the law applicable to education will be of particular interest to students and can therefore make a significant contribution toward that goal.

Julius Menacker
Guest Editor



Civil Rights in the School Setting

An overview of major national school legislation and the federal courts' roles in the constitutional areas of equal protection, freedom of expression, and due process

Julius Menacker

Historical Background

Until the middle of this century, there were relatively few laws affecting educator or student rights and responsibilities, and the number of court cases involving school matters was even lower. Appointment as a teacher was considered a privilege. Therefore, teachers were expected to obey their superiors without question. If teachers wanted to exercise certain civil rights as American citizens, they were free to do so. However, if exercise of these rights offended their employers, they could be discharged.

This "privilege doctrine," as applied to teachers, is illustrated by the U.S. Supreme Court decision of *Adler v. Board of Education,* 342 U.S. 485 (1952), in which a New York teacher was fired for membership in an organization that the state proscribed. In upholding the dismissal, the Supreme Court held that, if teachers "do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere." The Court even went so far as to sanction what would now be considered the undemocratic concept of guilt by association when it wrote that "[o]ne's associates, past or present . . . may properly be considered in determining fitness and loyalty."

The traditional view of student rights was similar but even more restrictive. The dominant position was that it was a privilege to be afforded a free public education and this privilege could be withdrawn when the authorities judged that students were unworthy of this benefit. Educator authority over students was further strengthened by the traditional common law principle of "in loco parentis"; that is, educators have the legal standing of a parent in relation to their students. This principle is well illustrated by the dissent of Justice Black to the 1969 Supreme Court *Tinker* decision, which overturned the privilege doctrine applied to public school students.

In protest over the decision to grant students free speech rights over school administrators' objections, Black wrote:

> I deny . . . that "students" and "teachers" take with them into the "schoolhouse gate" constitutional rights. . . . The original idea of schools, which I do not believe is yet abandoned as worthless or out of date, was that children had not yet reached the point of experience and wisdom which enabled them to teach all of their elders. It may be that the Nation has outworn the old-fashioned slogan that "children are to be seen not heard"; but one may, I hope, be permitted to harbor the thought that taxpayers send children to school on the premise that at their age they need to learn, not teach. . . . Turned loose with lawsuits for damages and injunctions against their teachers as they are here, it is nothing but wishful thinking to imagine that young, immature students will not soon believe it is their right to control the schools rather than the right of the States that collect the taxes to hire the teachers for the benefit of the pupils. This case . . . subjects all the public schools in the country to the whims and caprices of their loudest-mouthed, but maybe not their brightest, students.
>
> —*Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969)

Decisions for Students and Teachers

There were a few early Supreme Court decisions that did afford rights to students and teachers. Most notable were two decisions in the 1920s and one in the 1940s. In 1923, the Court decided the case of *Meyer v. Nebraska*, 262 U.S. 390. In the isolationist mood of the country following the end of World War I, Nebraska had passed a law prohibiting instruction in languages other than English, along with

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foreign language instruction, prior to high school. Meyer, a parochial elementary school teacher who taught German, sued. He contended that this law violated his Fourteenth Amendment right to due process, as the law unreasonably deprived him of liberty and property interests.

The Supreme Court agreed with Meyer, deciding that a "mere knowledge of the German language cannot reasonably be regarded as harmful." Further, Meyer's "right thus to teach and the rights of parents to engage him so to instruct their children [were thought to be] within the liberty of the [Fourteenth] Amendment."

Two years later, the Supreme Court had more to say about parental rights and parochial schools. As a way to insure that proper attitudes of American loyalty and patriotism were developed, Oregon had passed a law that required all children to be enrolled exclusively in public schools. The Society of Sisters, whose parochial school would be closed by the act, sued, claiming that it violated the society's Fourteenth Amendment liberty and property interests. Again, the Supreme Court agreed with the teachers rather than the state. In doing so, the Court issued a memorable statement defining the rights of parents with regard to their children's education:

> [T]he Act . . . unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. . . . [R]ights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state. The fundamental theory of liberty under which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.
>
> —*Pierce v. Society of Sisters*, 268 U.S. 510 (1925)

In the 1920s, the Supreme Court acted to secure the rights of parents, teachers, and nonpublic schools to make educational decisions free from state government restrictions that were clearly unreasonable. In 1940, with the nation on the brink of World War II, the Supreme Court considered whether West Virginia had the right to force all public school students to participate in the flag salute exercise, even though participation would violate the religious principles of some students. In *Minersville v. Gobitis*, 310 U.S. 586, the Court found for the state and against the protesting Jehovah's Witnesses students. However, two years later, the Court showed it could change its mind when, in a similar case, it ruled that the religious principles of the Jehovah Witnesses students were more important than the requirement to salute the flag:

> That [boards of education] are educating the young for citizenship is reason for scrupulous protection of constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of government as mere platitudes.
>
> —*West Virginia v. Barnette*, 319 U.S. 624 (1943)

The *Meyer*, *Pierce*, and *Barnette* decisions were exceptions to the general policy of limiting student and teacher rights. This would change as the civil rights movement emerged and the Cold War created greater interest in the effectiveness of the nation's public schools.

School Law Expansion

The Cold War and the civil rights movement increased national legal influence over education. One reason was that, since many of the court cases involved disputes about rights guaranteed by the Constitution, they were heard in federal courts. Another reason was that recognition of the growing importance of education to the national welfare led to the passage of many federal laws providing funds supporting particular educational programs. First, there was the National Defense Education Act of 1958, which provided federal funds to improve mathematics, science, and foreign language instruction, along with school guidance and counseling services. These areas were seen as important to the nation's defense strength relative to the Soviet threat. The influence of the civil rights movement was evident in passage of the Elementary and Secondary Education Act of 1965, which provided millions of dollars to improve and support the education of poor students. This legislation was based on the belief that the best way to eliminate poverty was through education.

Concern for fair treatment of handicapped students was expressed in the passage of the Education for All Handicapped Children Act of 1975 (recently reauthorized as the Individuals with Disabilities Education Act). This act recognized that students with various physical, mental, or emotional handicaps needed to be better served by the public schools, and it gave parents the right to contest school decisions regarding the identification, placement, and treatment of disabled students.

Concerns about equal treatment and fairness also led to the passage of Title IX of the Education Amendments of 1972, which guaranteed equal rights for females in educational programs, and the Family Rights and Privacy Act of 1974, which protected students' privacy and information rights relative to school records. Along with federal funding came federal regulations and oversight, greatly increasing federal influence over public education.

All this legislation, combined with a pro-civil rights attitude in the Supreme Court, created a dramatic expansion of school law. Among the major issues that have defined it are constitutionally guaranteed civil rights, and the balance of this review will focus on constitutional issues.

It should be noted that, while the

Fourteenth Amendment protects people against abuses by state government, the other civil rights amendments protect people only from abuses by the national government. However, the Supreme Court has developed a theory of "incorporation" whereby "fundamental liberties" (e.g., religion, expression, privacy) have been interpreted also to apply to the relationship of the state to its people, by virtue of the Fourteenth Amendment.

We now turn to a review of developments in civil rights issues related to education. While there has been much school-related litigation in state courts, this review will emphasize Supreme Court decisions in the areas of equal protection, due process, and free expression. Other important areas of school law (religion, sexual harassment, school order and safety) are discussed elsewhere in this issue.

Segregation and Equal Protection

Near the end of the 1930s, a new school law issue arose that was to dominate the national scene for decades: racial discrimination in public education. Those opposed to public school segregation claimed that states having it were in violation of the Equal Protection Clause of the Fourteenth Amendment, which mandates that they may not deprive people within their jurisdiction of liberty or property without giving them equal treatment with others; i.e., "equal protection of the laws."

The Legal Defense Fund of the National Association for the Advancement of Colored People (NAACP) set in motion a strategy to defeat legal school segregation in the Deep South and many bordering states. The legal justification for this segregation had been established earlier in the 1896 Supreme Court decision of *Plessy v. Ferguson*, 163 U.S. 337, which announced that, where states established "separate but equal" facilities for the races, the Fourteenth Amendment Equal Protection Clause was not violated.

There was one lone dissent: Justice Harlan held that the "Constitution is color-blind, and neither knows nor tolerates classes among citizens." The NAACP was determined to see that minority view become law.

The NAACP initiated a series of higher education cases in which states were sued because they did not provide "separate-but-equal" law or graduate school educations for African Americans. As states with segregation laws were forced to admit black plaintiffs to graduate and law schools, the NAACP lawyers succeeded in weakening legal educational segregation. Then, as the 1950s opened, the NAACP attacked the major public school issue, which culminated in the 1954 Supreme Court decision of *Brown v. Board of Education of Topeka*, 347 U.S. 483. Led by Chief Justice Earl Warren, a unanimous Supreme Court reversed *Plessy v. Ferguson* and declared public school racial segregation to be in violation of the Fourteenth Amendment Equal Protection Clause. Among the memorable statements made in that decision were the following:

> Today, education is perhaps the most important function of local and state governments. . . . It is the very foundation of good citizenship. . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.
>
> . . . To separate them from others . . . solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. . . .
>
> We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal.

The *Brown* decision led to a long list of subsequent school desegregation cases in lower federal courts and the Supreme Court that continue to the present day. One result of the precedent established by *Brown* was the decision of a federal court in *Hobson v. Hansen*, 269 F.Supp. (1967), that the way school testing and tracking policies were implemented, which resulted in the assignment of minority and poor children to the lower educational tracks, violated equal protection. Later, in *Larry P. v. Riles*, 495 F.Supp. 926 (1979), aff'd (9th Cir. 1984), a federal court in California held that the tests used for placing minority students in special education were culturally biased, as were the procedures used.

Meanwhile, the Supreme Court used the Equal Protection Clause to decide cases that (1) required faculty integration in *Rogers v. Paul*, 382 U.S. 198 (1965), (2) approved forced busing to promote school integration in *Swann v. Charlotte-Mecklenburg*, 402 U.S. 1 (1971), (3) required schools to provide for the needs of non-English speakers, under the Civil Rights Act of 1964 in *Lau v. Nichols*, 414 U.S. 563 (1974), (4) required the admission of children of illegal aliens to public school in *Plyler v. Doe*, 457 U.S. 202 (1982), and (5) over the objections of state authorities and voters, approved a lower court order to increase state and local taxes so as to fund magnet schools that would voluntarily attract students of all races in *Missouri v. Jenkins*, 110 S.Ct. 1651 (1990).

After the 1960s, integration supporters received some court setbacks as well. One occurred in the Supreme Court decision in *San Antonio v. Rodriguez*, 411 U.S. 1 (1973). Plaintiffs claimed that a state school finance system that relied on local school district property taxes for the major portion of school funding violated the Equal Protection Clause. The reason was that this system resulted in extreme differences in the money spent for the education of students in rich and poor districts. The Supreme Court rejected this argument. However, in recent years, the issue of state responsibility for equal funding of each student's education, regardless of the wealth of each school district, has been addressed in state

courts. The result is that, currently, many state supreme courts have required more equalization in school district finance.

On another aspect of equal protection, white students were given some opportunity to compete with minority students for college places previously reserved for minority students in *Regents of the University of California at Davis v. Bakke*, 438 U.S. 265 (1978). Further, the Supreme Court reversed a lower court order for suburban and city districts to combine for the purpose of promoting integration in *Milliken v. Bradley*, 418 U.S. 717 (1974).

In 1991, the Court terminated a long-standing school desegregation order in *Board of Oklahoma City v. Dowell*, 111 S.Ct. 630 (1991), because progress had been made, even though all vestiges of former segregation had not been completely removed. Then, in *Freeman v. Pitts*, 112 S.Ct. 1430 (1992), the Court determined that a school district under a long-standing desegregation order may be released from court supervision in incremental stages, before full compliance with complete desegregation has been achieved.

Free Expression Decisions

The liberal attitudes toward civil rights in education unleashed by *Brown* saw the Court expand teacher and student civil rights. In the 1960s in *Pickering v. Board of Education*, 391 U.S. 563 (1968), the Supreme Court interpreted the First Amendment's Free Speech Clause to grant teachers free expression rights even when their superiors did not agree to the views, provided the school was not disrupted. The next year, in *Tinker v. Des Moines*, 393 U.S. 503 (1969), the Court gave students the right to free expression on important societal issues, even when school officials objected, provided school was not disrupted.

As with the history of school desegregation cases, there has been some countermovement from the decisions of the 1960s and 1970s. In 1986 in *Bethel v. Fraser*, 478 U.S. 675, the Supreme Court cut back on students' expression rights when it decided that a student who had delivered a high school assembly address that contained "graphic and explicit sexual metaphor" had gone too far. The student's suspension and deprivation of other privileges were upheld because of the school's mission of "inculcating habits and manners of civility" among its students. Then, two years later in *Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1988), the Court approved the action of school authorities in censoring materials written by students in the school newspaper because it was "school sponsored," giving school officials the right to determine what was proper and improper to appear in it.

Due Process and Education

In addition to the equal protection rights granted to people in relation to the states in which they live, the Fourteenth Amendment also protects people against the possibility that a state government (or its agents, such as school districts) might deprive them of liberty or property without "due process of law." The due process concept has a long history going back to Anglo-Saxon traditions. Its primary interest is for government to treat people fairly when proceeding against their liberty or property interests. Justice Felix Frankfurter

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described the essential meaning of due process this way:

> Due process . . . [represents] a profound attitude of fairness between . . . the individual and government. . . . [It] is compounded of history, reason, the past course of decision, and stout confidence in the strength of the democratic faith which we possess. Due process is not a mechanical instrument. . . . It is a delicate process of adjustment inescapably involving the exercise of judgment.
>
> —*Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123 (1951)

In 1972 in *Perry* v. *Sindermann*, 408 U.S. 593, the Supreme Court turned to the Due Process Clause of the Fourteenth Amendment to protect tenured teachers against unreasonable dismissal by requiring school authorities to give them a hearing where they could defend themselves by forcing school authorities to justify the dismissal on reasonable grounds. It is instructive to observe that, on the same day that the Supreme Court announced its *Perry* v. *Sindermann* decision, it also delivered its opinion in *Regents* v. *Roth*, 408 U.S. 564, where it held that, while teachers had a right to be employed in their chosen profession, in order to establish a liberty or property interest in continued employment, they "must have more than an abstract need or desire for it." Roth, an untenured teacher, could not establish "a legitimate claim of entitlement to it." Therefore, unlike *Sindermann*, Roth's due process claim was rejected. These companion cases illustrate how the Supreme Court attempts to make fair decisions based on the particular facts of each case, while also teaching the public about its reasoning.

In *Cleveland* v. *LaFleur*, 414 U.S. 632 (1974), the Supreme Court used the concept of "substantive due process" (protection against unreasonable state actions depriving people of property or liberty) to invalidate a school district requirement that pregnant teachers had to leave their jobs when they entered the fifth month of pregnancy, because the school board could not present a convincing justification of why the teacher should be deprived of the opportunity to continue teaching on that basis. Substantive due process was also used by a lower federal court in *Hall* v. *Tawney*, 621 F.Supp. 607 (1980), to support a student's suit against a teacher who inflicted unreasonable corporal punishment. The court decided that the punishment was "literally shocking to the conscience" and therefore violated substantive due process.

The Due Process Clause was invoked by the Supreme Court on behalf of students when it ordered schools to give students procedural due process rights before they could be suspended from school. In *Goss* v. *Lopez*, 419 U.S. 565 (1975), the Court held that "At the very minimum . . . students facing suspension . . . must be given some kind of notice and afforded some kind of hearing." When students were faced with long suspensions or expulsions, they were entitled to greater due process protections, including the right to call witnesses in their defense and to have an attorney.

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Scope of School Law

Our nation has always viewed the schooling of our youth as important. As a result, even though plenary power over education is within state authority, the national government has also vigorously participated in educational policy matters. This review has been limited to major national legislation and the role of the federal courts in the constitutional areas of equal protection, freedom of expression, and due process. The scope of school law is much broader. It involves issues of religious freedom; privacy; the rights of disabled students and non-English speakers; the rights of female students to equal treatment and freedom from sexual harassment; issues of school order and safety; policy affecting private schools; matters of contracts and property; collective bargaining; questions of school district and teacher liability for negligence and other torts; issues related to teacher evaluation, hiring, and dismissal; home-schooling; and many other topics.

The many state and federal laws and court decisions affecting education are proof of the concern that our nation places on proper, fair, equitable, and effective education. It has fallen to the courts to serve as arbiters of what is and is not legal educational policy, particularly with regard to constitutional civil rights. However, it is important to note that the courts are in a reactive position in our system of governmental separation of powers. Courts can only decide the cases brought before them.

The initiative for school policy lies with local school district boards of education, state legislatures and school boards, and Congress. Therefore, the ultimate authority rests with the people who elect legislators and boards of education, or, in the case of appointed boards, the officials who appoint them. □

Teaching Strategy

Will Dress Codes Save the Schools?

Aggie Alvez

Background

Ripped jeans. Michael Jordan T-shirts. Simpson T-shirts. Doc Martens. Baggy pants. Leather coats. Gold jewelry. Miller beer T-shirts. Red bandannas. Paisley scarves.

Look into any teenager's closet and you're likely to find these and other clothes that are trendy among the high school set. You're also likely to find them on the banned lists of many school districts across the country.

As administrators try to grapple with the increasing violence in their schools, they are resorting to a variety of methods of keeping the peace. Closed lunches, extra security guards, and metal detectors are some of the more drastic measures. But dress codes seem to be the major trend in cities, and they are on the upswing in many suburban areas.

Administrators cite a number of reasons for dress codes. Some baggy clothes and coats are banned because they can be used to conceal weapons or drugs. Expensive clothes and jewelry are banned because students who wear them run the risk of being killed by those who want them. In Washington, D.C., school officials banned shirts emblazoned with handguns and bullet holes because of the alarming rate of homicide among young African-American males. In Grapevine, Texas, Doc Martens-like combat boots were banned because they are associated with skinhead groups. In northern Virginia, T-shirts that insult students from other schools are banned because of their inappropriateness. And, in many school districts, you'll find a boilerplate ban on any T-shirts that promote drugs, alcohol, sex, and violence.

School administrators say that dress codes help to promote self-respect and reduce conflict. Some schools have gone a step farther in requiring or strongly encouraging students to wear uniforms. In Baltimore City, 90 percent of the elementary school students now voluntarily wear school uniforms, and the policy is making its way to the middle schools.

As gang membership grows throughout the country, so does the number of schools that impose dress codes. Many California school districts ban red or blue bandannas and caps, L.A. Raiders jackets, and other athletic attire because of their association with street gangs.

But, while creating safe and effective learning environments is a necessary school district goal, trying to achieve this end through the imposition of dress codes poses constitutional and practical problems, especially in stemming gang violence.

Constitutional Rights?

Since the 1969 *Tinker* decision (see Student Handout 1), courts have viewed student dress as a First Amendment right not to be abridged unless the expression "materially and substantially interferes with the educational process." To date, there is no empirical evidence that dress codes inhibit school gang activity; yet, some schools ban certain "gang clothing" despite the fact that there are no gangs in the school or community and no showing that the attire interferes with learning in any way whatsoever.

Dress codes are also being attacked because they are overbroad. One Arizona honor student was sent home for wearing a Chicago Bulls T-shirt that his mother had bought him. In the ensuing case, the American Civil Liberties Union argued that the dress code sweeps in protected clothing because professional sports logos are widely worn in the community and are not limited to gangs.

There are some Fourteenth Amendment attacks on dress codes, as well. Minority students, especially African Americans and Latinos, say that schools are singling them out over the clothes they wear. In San Diego, African-American students say they are prohibited from wearing red or blue attire, while their white counterparts may wear the same colors.

Practical problems abound. How do schools determine what qualifies as gang related? How can administrators keep up with the changes in what's "in" from gang to gang and from school to school? Does certain attire signify gang membership or merely MTV viewership? How are angered parents to be appeased when they must buy new clothes for their kids?

Connection to Success?

Can a dress code withstand constitutional scrutiny? Maybe, if a school can show a direct connection between the dress code and academic attainment. While *Tinker* recognized a student's right to free expression, cases since 1969 have retreated from this standard, and the Supreme Court has given broader deference to school boards in determining how best to maintain discipline.

Meanwhile, today, as in the past, students argue that what they learn

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about the Bill of Rights in their civics or law classes is at odds with what they experience in school. In the sixties, girls couldn't wear pants; in the seventies, heavy metal T-shirts were banned; in the eighties, it was halter tops; and, in the nineties, it's baggy jeans.

Objectives

Can students and administrators find a healthy balance between the First Amendment and the mandate to provide a safe environment conducive to learning? This strategy will engage students in a meaningful discussion about school discipline and school violence through an analysis of the legal, economic, social, and political implications of dress codes. As a result, students will be able to:

- state the rationale for school dress codes
- discuss constitutional, economic, social, and political implications of dress codes
- analyze a dress code from the perspective of community members
- participate in a mock school board hearing

Target Group: Secondary students

Time Needed: 3-5 class periods

Materials Needed

2 signs (see 1 under "Procedures")
Student handouts 1 and 2

Procedures

1. Prepare two signs that say "NO DRESS CODES" and "UNIFORMS FOR ALL." Display them at either end of a wall, forming a continuum. Select 8-10 students to position themselves along the continuum based on how they feel about dress codes. Those who think that all public school students should wear whatever they please should stand under "NO DRESS CODES." Those who think that all students should wear uniforms should stand under that sign. The other students should arrange themselves somewhere in between.

(continued on page 12)

Student Handout 1: *Tinker, Fraser, Hazelwood,* and *T.L.O.*

A. *Tinker v. Des Moines School District*, 393 U.S. 503 (1969)/6-1-2

Facts

As symbols of their objection to the Vietnam War, Mary Beth Tinker, her brother John, and several other students decided to wear black arm bands to school. When school administrators learned of this, they adopted a policy of asking anyone wearing arm bands to remove them. Students who refused would be suspended until they returned to school without the arm bands. The Tinker group knew this regulation and wore their arm bands anyway. No violence or serious disruptions occurred, although some students argued the Vietnam issue in the halls. The Tinker group were suspended from school when they refused to remove their arm bands.

Issue

Is wearing arm bands at school to protest a war a form of speech that the First Amendment protects?

Court Decision (Fortas)

Yes, wearing arm bands is a form of expression (symbolic speech) that the First Amendment protects. Declaring that "students do not shed their constitutional rights . . . at the schoolhouse gate," the Court reasoned that, while educators may teach what they deem appropriate, "state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students [who] may not be regarded as closed-circuit recipients of only that which the State chooses to communicate." However, the Court said that schools may censor student speech that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others."

Dissent (Black, Harlan)

School authorities should have the power to determine disciplinary regulations for the schools. One may not give speeches or engage in demonstrations wherever he pleases and whenever he pleases. School discipline is an integral part of training children to be good citizens. School officials should be given the widest authority in maintaining discipline and good order.

B. *Bethel School District v. Fraser*, 478 U.S. 675 (1986)/5-2-2

Facts

Matthew Fraser gave a one-minute nominating speech before 600 fellow high school students at a school-sponsored assembly. Part of his speech referred to his candidate in sexual metaphor:

> I know a man who is firm—he's firm in his pants, he's firm in his shirt . . . but, most of all, his belief in you, the students of Bethel, is firm. Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds. Jeff is a man who will go to the very end, even the climax, for each and every one of you . . .

Prior to giving the speech, several teachers advised Fraser that it was inappropriate and he should not deliver it. During the speech, some students hooted and yelled, some mimicked sexual activities, and others appeared embarrassed. Fraser was suspended for violating the school's "disruptive conduct" rule, which prohibits conduct that substantially interferes with the educational process, including the use of any obscene, profane language or gestures.

Issue

Does the First Amendment prevent a school from disciplining a high school student for giving a lewd speech at a school assembly?

Court Decision (Berger)

No, schools must have the authority to "inculcate the habits and manners of civility essential to a democratic society." Public school students' constitutional rights are not automatically coextensive with the rights of adults in other settings. The speech was plainly offensive and acutely insulting to teenage girl students. A school is entitled to "disassociate itself" from the speech to demonstrate that such vulgarity is "wholly inconsistent with the values of public education." Unlike *Tinker*, the penalties imposed in this case were unrelated to any political viewpoint.

Dissent (Marshall, Stevens)

The speech did not disrupt the educational process. Fraser was in a better position to determine whether his speech would offend his contemporaries than a group of judges who are "at least two generations and 3,000 miles away from the scene of the crime." Fraser should not be disciplined for speaking frankly at an assembly if he had no reason to anticipate punitive consequences.

C. *Hazelwood School District* v. *Kuhlmeier*, 484 U.S. 260 (1988)/5-3

Facts

A high school principal deleted two pages from the year's final issue of the school newspaper because they contained a story on student pregnancy and another on divorce's impact on students. The newspaper had been written and edited by the school's Journalism II class. The principal believed that the first story violated the privacy rights of some pregnant students, even though aliases had been used. He also believed that the references to sexual activity and birth control were inappropriate for some of the younger students. The principal objected to the divorce article because he believed it lacked "fairness and balance" and stressed that the parents should have been given an opportunity to respond to the remarks or to consent to their publication.

Issue

Did the principal's censorship of a school-sponsored newspaper violate the students' First Amendment protection of freedom of expression?

Court Decision (White)

No, the school newspaper is not a public forum for public expression. As a school-sponsored activity that is part of the curriculum, the newspaper may be regulated broadly by school officials. The principal did have the authority to regulate the style and content of the newspaper as long as his actions were "reasonably related to legitimate pedagogical concerns." Here, the principal acted reasonably in trying to protect the privacy of the students and the parents, and in shielding younger students from "inappropriate" material.

Dissent (Blackmun, Brennan, Marshall)

Students should enjoy the protections of the First Amendment whether or not the activity is sponsored by the school. There is no evidence that the stories would have seriously disrupted the classroom or interfered with the rights of others. The only lesson the students learned from the Journalism II class was that important principles of government are mere platitudes.

D. *New Jersey* v. *T.L.O.*, 469 U.S. 325 (1985)/5-1-3

Facts

A teacher in a New Jersey high school discovered two girls smoking in the lavatory, in violation of a school rule. They were taken to the vice principal's office and questioned. When T.L.O. denied that she had been smoking, the vice principal demanded to see her purse. He found a pack of cigarettes and also noticed rolling papers, which are commonly associated with marijuana. The vice principal then searched her purse and found marijuana, a pipe, plastic bags, a large amount of money, and written materials that implicated T.L.O. in drug dealing. The police were notified, T.L.O. confessed, and she was charged with delinquency.

Issue

Are student searches conducted by school officials without probable cause in violation of the Fourth Amendment?

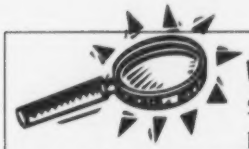
Court Decision (White)

No, while students do have a reasonable expectation of privacy, schools are special environments and this, coupled with the special characteristics of teacher-student relationships, "make[s] it unnecessary to afford students the same constitutional protections granted adults and juveniles in non-school settings." Rather than "probable cause," a "reasonable grounds" standard is acceptable in the school context. When weighing the child's interest in privacy against the interest of school officials in maintaining discipline in the classroom and on school grounds, the latter is more compelling.

Dissent (Brennan, Marshall, Stevens)

The new "reasonableness" standard will only spawn increased litigation and greater uncertainty among teachers and administrators. Schools are places where we "inculcate the values essential to the meaningful exercise of rights and responsibilities. . . . " Using arbitrary methods to convict students is unfair and sends a "curious" message to the country's youth.

Note: Majority, concurring, and dissenting votes appear after case name; author of majority opinion appears after "Court Decision"; all dissenting Justices appear after "Dissent."



When Gangs Are the Problem . . .

Schools shouldn't adopt dress codes to address gang problems unless there is a true gang problem, not a potential one. If there is a gang problem, administration should be prepared to prove that the gang's presence poses a "material and substantial interference" with the educational process. Once a dress code is in place that meets appropriate standards, schools must be careful not to selectively enforce it, and they must keep abreast of changing trends. Some school districts do so by meeting regularly with the local police and updating their students, faculty, and parents on the changes.

For example, those who believe that there should be certain restrictions depending on grade level, would be toward the center, while those who would impose yet other restrictions would move closer to "UNIFORMS FOR ALL." Tell the students they will have to talk to one another in order to determine exactly how they should line up.

Once the students are in place, ask them to describe their positions, but not to give any reasons for selecting them. Students who feel they are standing in the wrong place may move at any time. Next, ask the students to justify their positions, making sure there are no interruptions by those "on the line" or by those remaining in their seats. Give all students the opportunity to question those on the line. Ask students to cite the most compelling arguments they heard from either end.

2. Review the First Amendment with the students. Distribute Student Handout 1, "*Tinker*, *Fraser*, *Hazelwood*, and *T.L.O.*" If they have already studied these cases, use the handout for review. If not, analyze each case thoroughly.

   You may want to use a cooperative learning strategy, such as the jigsaw method, to have students teach each other the facts, issues, and decisions of the cases. Emphasize the following points for each case:

   Tinker: The school must prove that there is a "material and substantial interference with the educational process" in order to limit speech. It must show actual, not just potential, disruption.

   Fraser: This case is a retreat from *Tinker*, where the Court gave broad deference to school boards. This case would probably support dress codes.

   Hazelwood: Another retreat from *Tinker*. The Court said that, while schools had to tolerate speech, they need not promote it. Again, broad deference is given to schools.

   T.L.O.: Although not a First Amendment case, *T.L.O.* shows a retreat from student rights and defers to the schools on how best to maintain discipline.

3. Review the concepts "overbreadth" and "vagueness" when analyzing laws or policies. A statute is overbroad, and therefore unconstitutional, when it sweeps in protected speech along with speech that may legitimately be curtailed. A statute is vague, and therefore unconstitutional, when "reasonable people would guess at the law's meaning and differ as to its application."
4. Divide the class into groups of 3-5. Distribute Student Handout 2, "Tri-Valley Dress Code." Read "Proposed Dress Code" and "Is There a Dress Code Violation?" Tell each group to decide whether each of the scenarios involved a dress code violation. There should be some controversy in trying to apply the proposed dress code to each situation. Tell the students they will be able to participate in a mock school board hearing to discuss the policy.
5. Read "Mock School Board Hearing." Assign each group one of the eight roles, and split off a ninth group to act as the school board (select an odd number of students to ensure a majority vote.) Each group should prepare its argument/statement for the hearing. The "school board" should elect a president and develop questions to ask each group.
6. Conduct the mock hearing. After all testimony is heard, the school board should confer openly for the class to hear, and then vote.
7. The school board may vote to accept the policy with certain modifications. The groups can then be assigned to draft a new policy following these criteria: the policy should be constitutional, clear, understandable, and enforceable.
8. Compare the policies drafted by the students with your school's dress code or those of other schools.

Are Curfews an Answer to Crime?

Ask your students to try to answer this question after reading them this list of cities that use curfews to curb rising juvenile crime rates. Explain that, since enforcement varies from city to city, it's hard to tell whether curfews really do curb crime. Civil liberties groups protest curfews as unfairly restricting teenagers' liberty without allowing due process.

- Atlanta, Ga.
- Buffalo, N.Y.
- Dade County, Fla. (Miami)
- Dallas, Tex.
- Hartford, Conn.
- Milwaukee, Wis.
- Newark, N.J.
- Phoenix, Ariz.
- Tampa, Fla.

Student Handout 2: Tri-Valley Dress Code

Proposed Dress Code

Teachers and administrators of the Tri-Valley School District are concerned about the increase of violence in their schools and note that there is a growing problem with weapons and drugs, as well as pockets of gang activity. District parents and educators in the district believe that, when students wear T-shirts that symbolize drugs, violence, and sex, they make the schools a "breeding ground for immoral, illegal, and dangerous behavior."

In response to the concerns of teachers, administrators, and parents, and in an effort to develop a consistent policy for the entire school district, the following dress code for students in grades K-12 is proposed:

Dress Code

The students of the Tri-Valley School District have the inalienable right to attend schools that are safe, secure, and peaceful. They have the right to exercise free expression except where that expression creates a clear and present danger of unlawful activity, of the violation of school regulations, or of the substantial disruption of the orderly operation of the school.

Students are prohibited from wearing any clothing or accessory that:

1) promotes or glorifies violence, drugs, tobacco, or alcohol or;
2) contains gang symbols or logos, or denotes gang affiliation or;
3) is sexually obscene or explicit or;
4) promotes unlawful or immoral behavior.

Students who violate the dress code will be asked to remove the offensive clothing and may face disciplinary action if they refuse to do so or if the incident is repeated.

Is There a Dress Code Violation?

1. Middle and high school students have begun wearing T-shirts depicting a 9 mm handgun on the front with the words "If This Don't Get Ya," and a picture of an Uzi on the back of the shirt with the words "This One Will."
2. A sixth-grade girl wore a T-shirt that bore the words "Real women love Jesus."
3. A fifth grader wore a Chicago Bulls T-shirt. Gang experts have stated that clothes with professional teams on them have been linked to gangs and could make those wearing them easy targets for gang violence.
4. High school students have begun wearing "safe sex" shirts with anti-AIDS messages and clear pockets with condoms in them. Some of the slogans on the shirts include: "Tools for Late Night," "Deep Cover for the Brother," and "AIDS—HELL NO."
5. An eleventh-grade male student wore a T-shirt depicting a woman shoved in a trash can with her underwear around her ankles. The caption read: "Guns 'N Roses was here."
6. A twelfth-grade female student wore a T-shirt with the caption: "I'm a lesbian and I vote." A controversial election over a gay rights ordinance was to be held in a few weeks.
7. A junior high school student wore a shirt that said: "Save the planet. Kill a cop."
8. An eighth grader came to school wearing baggy khaki pants several sizes too big for him. Gang experts say the oversized pants signify gang affiliation. Students who belong to gangs attend the school.

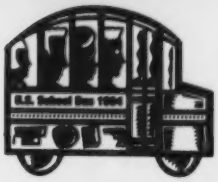
Mock School Board Hearing

The proposed dress code of the Tri-Valley School District will be the topic of an open forum before the next school board meeting. Representatives from these groups will testify before the board:

Support Dress Code	*Oppose Dress Code*
PTA	Coalition of Vendors,
Fraternal Order of Police	Retailers, and Manufacturers
Fellowship of Christian	American Civil Liberties Union
Student-Athletes	Students for School Rights
Teachers Union	Parents Against Censorship

Guidelines

1. Testimony will be limited to four minutes per group.
2. School board members will have the opportunity to question speakers.
3. The school board will confer in open session and vote on the proposed dress code at the conclusion of all testimony.



From Consensus to Confusion:

Should the Wall of Separation Be Demolished or Rebuilt?

An analysis of the development and disintegration of Supreme Court Establishment Clause interpretations, and the ensuing public controversy over separation of church and state

David Schimmel

In 1947, the nine Supreme Court Justices all agreed that the Establishment Clause of the First Amendment was intended to build a wall of separation between church and state. Today, that consensus has been shattered, not only among the Justices, but also throughout the country. On the Court, there are two or three competing interpretations of the Establishment Clause, and it is unclear which interpretation would receive a majority vote in any given case. In hundreds of communities throughout the country, there is mounting confusion and controversy among lawyers, educators, and voters over a recent Supreme Court decision that outlawed invocations and benedictions at public school graduations.

This article traces the extraordinary progression of Establishment Clause interpretation from consensus to confusion. After outlining the Court's original interpretation of the Establishment Clause, it examines how that interpretation was developed by Justice Burger in *Lemon* v. *Kurtzman* and later attacked, first by Justice Rehnquist and then by Justice Scalia. Finally, it focuses on the Court's conflicting opinions in the graduation prayer case, *Lee* v. *Weisman*, and the intense public controversy that continues to surround this complex and contentious issue.

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Precedents

Everson: *Erecting the Wall*

Our story of constitutional interpretation begins in 1947, when the Supreme Court was required "to determine squarely for the first time" what was an establishment of religion. In *Everson v. Board of Education of the Township of Ewing*, 330 U.S. 1, 29 (1947), all the Justices agreed with Thomas Jefferson that "the clause against establishment of religion by law was intended to erect 'a wall of separation between church and state.'" However, the Justices split 5-4 over whether the Constitution should prohibit the government from reimbursing parents for transporting their children to religious as well as public schools. The majority held that the First Amendment did not prohibit reimbursement; the dissenters argued that it did. While the Justices differed about the height of the wall, they did not differ in their adherence to the principle that church and state should be separate.

Not surprisingly, the dissenters argued that the purpose of the First Amendment was broader than prohibiting an established church: "it was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion." In fact, wrote Justice Rutledge, "we have staked the very existence of our country on the faith that complete separation between the state and religion is best for the state and best for religion."

While the majority did not feel that a law helping parents transport their children to religious schools violated the Establishment Clause, they were as zealous as the minority in their strong and uncompromising support for the principle of separation. Thus, on behalf of the Court, Justice Black concluded with these categorical statements: "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach."

In sum, both the majority and the dissenters seemed unequivocal in their belief that the Establishment Clause called for a strict separation of church and state. Over the decades, that consensus would erode. That erosion began to appear in *Lemon* v. *Kurtzman*, 403 U.S. 602, 612 (1971), a landmark case in Establishment Clause interpretation decided 25 years after *Everson*.

Lemon: *The Three-Part Test*

In *Lemon*, Chief Justice Burger summarized "the cumulative criteria developed by the Court over many years" in interpreting the Establish-

ment Clause. This summary, known as the three-part test for determining whether a challenged government policy or practice was constitutional, stated: "First the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion."

Lemon concerned Rhode Island and Pennsylvania laws that provided salary supplements and salary reimbursements paid to teachers in nonpublic schools. Applying the three-part test to the facts of the case, the Court found that the laws involved unconstitutional entanglements between government and religion. However, in striking contrast to the Justices in *Everson*, Chief Justice Burger repeatedly confessed that the purpose of the Establishment Clause was far from clear. Thus, he wrote that its meaning "is at best opaque" and that "Candor compels acknowledgment . . . that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law." Again, in contrast to the clarity of *Everson*'s "high and impregnable" wall of separation, Burger wrote: " . . . the line of separation, far from being a 'wall,' is a blurred, indistinct and variable barrier depending on all the circumstances of a particular relationship." Thus, in *Lemon*, Justice Burger begins to undermine the Court's previously clear "separationist" approach to Establishment Clause interpretation.

Despite the Justices' apparent discomfort with *Lemon*, the Court continued to apply the three-part test in most Establishment Clause disputes and, as in *Grand Rapids v. Ball*, 473 U.S. 373 (1985), "in every case involving the sensitive relationship between government and religion in the education of our children." However, the Justices continued to be sharply divided in their application of the *Lemon* criteria in the cases that came before them during the 1970s and 1980s. During those decades, the Court considered over 27 cases dealing with establishment of religion; the Justices wrote almost 100 opinions, and in only three of those cases was the Court unanimous in its judgment (Underwood 809).

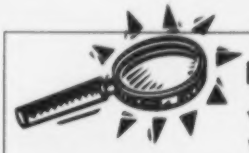
Rehnquist: Attacking Lemon *and the Wall*

After *Lemon*, several other Justices joined Burger in expressing doubts or concerns about the three-part test, but there was little strong, direct attack until 1985. Then, in a long dissent in *Wallace v. Jaffree*, 472 U.S. 38, 109 (1985), Justice Rehnquist not only attacked and repudiated the *Lemon* test, but he also tried to demolish its philosophical foundation, the wall of separation. (The following discussion of Justice Rehnquist's views is taken from Schimmel [1992]).

In *Jaffree*, the Supreme Court used the *Lemon* test to hold an Alabama silent prayer law unconstitutional because it had no secular purpose and was intended to advance religion. In his detailed 22-page opinion, Justice Rehnquist first noted that *Lemon*'s secular purpose part has been difficult to apply because the Court has never fully defined it or clearly stated how the test is to operate. Furthermore, wrote Rehnquist, *Lemon*'s entanglement part creates an "insoluble paradox" in school aid cases: courts "have required aid to parochial schools to be closely watched lest it be put to sectarian use; yet this close supervision itself will create an entanglement."

An additional problem with the three-part test, according to Rehnquist, is that it has "caused this court to fracture into unworkable plurality opinions depending upon how each of the three factors applies to a certain state action." Thus, the *Lemon* test has led to confusing and contradictory rulings that have "produced only consistent unpredictability." Justice Rehnquist concluded that, if a constitutional theory such as the three-part test has no basis in history, "is difficult to apply, and yields unprincipled results, I see little use in it."

A familiar judicial response to the difficulties or inconsistencies in applying a constitutional standard such as the *Lemon* test is to modify or reformulate it. This approach is illustrated by Justice O'Connor's suggestion that the *Lemon* test be "refined" to focus on the question of governmental endorsement of religion. Instead, Justice Rehnquist chose a radical approach—a complete rejection of the underlying principles that



Rehnquist: Establishment Clause History

When Justice Rehnquist wrote his long dissent to *Wallace v. Jaffree*, he presented a dozen pages filled with historical quotations to support his argument about the original meaning of the Establishment Clause. First, he discounted Jefferson's interpretation (since he was in France at the time the First Amendment was passed and ratified). Then he included quotations from James Madison, George Washington, members of the First Congress, and leading 19th century scholars to indicate that the clause simply "forbade establishment of a national religion and forbade preference among religious sects." He emphasized, however, that "it did not require government neutrality between religion and irreligion, nor did it prohibit the Federal Government from providing nondiscriminatory aid to religion."

Thus, Rehnquist concluded: "There is simply no historical foundation for the proposition that the Framers intended to build a wall of separation" between government and religion. In fact, wrote Rehnquist, "the wall of separation 'between church and state' is a metaphor based on bad history, a metaphor which has proved useless as a guide to judging. It should," he urged, "be frankly and explicitly abandoned."

support the three-part test. Thus, he proposed overturning more than 40 years of Supreme Court precedent and the well-established belief that the separation of church and state is and should be a basic constitutional value.

Justice Rehnquist acknowledged that the Court has repeatedly embraced Jefferson's belief that the Establishment Clause was intended to erect a wall of separation between church and state. However, Rehnquist wrote:

> It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson's misleading metaphor for nearly 40 years.

According to Rehnquist, the repetition of this misinterpretation by the Supreme Court in a series of opinions since 1947 "can give it no more authority than it possesses as a matter of fact; *stare decisis* may bind courts as to matters of law, but it cannot bind them as to matters of history."

Scalia: *Satirizing the Conflict*

When Justice Rehnquist wrote his dissenting opinion in *Jaffree*, it received relatively little publicity or comment. In 1985, it was possible to dismiss his views as the lonely, vociferous voice of an Associate Justice at the far right edge of the Court. But this was before Rehnquist was appointed Chief Justice and before the appointments of Justices Kennedy, Scalia, and Thomas, who now support Rehnquist's criticism of past Establishment Clause decisions.

In fact, in recent years, Scalia has replaced Rehnquist as the most strident and relentless critic of the *Lemon* test. Thus, in *Lamb's Chapel v. Center Moriches Union Free School District*, 113 S.Ct. 2141 (1993), Scalia satirized a majority of the Justices for even mentioning the *Lemon* test. He began with this creative comment:

> Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys . . .

Continuing his monster metaphor, Scalia noted that "Over the years, no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart." Scalia also emphasized his agreement with the "long list of constitutional scholars who have criticized *Lemon* and bemoaned the strange Establishment Clause geometry of crooked lines and wavering shapes its intermittent use has produced." He then announced that, henceforth, he "will decline to apply *Lemon*," whether he agrees or disagrees with the results of its use.

O'Connor and Kennedy: *Endorsement and Coercion Tests*

In the aftermath of the Rehnquist/Scalia criticisms, two alternative approaches to Establishment Clause interpretation have emerged to compete for judicial acceptance. The first is Justice O'Connor's "refinement" of *Lemon*, known as the "endorsement" test. Government action endorsing religion is invalid, she wrote, because it "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community" (*Lynch v. Donnelly*, 465 U.S. 668, 687-689 [1984]). O'Connor dropped *Lemon*'s excessive entanglement part and rephrased its purpose and effect tests. Thus, O'Connor's approach asks two questions: first, "whether government's purpose is to endorse religion" and, second, "whether the statute actually conveys a message of endorsement." The goal of her approach, wrote O'Connor, is "to frame a principle for constitutional adjudication that is not only grounded in the history and language of the First Amendment, but one that is also capable of consistent application."

In explaining her test, Justice O'Connor noted that it "does not preclude government from acknowledging religion"; however, it does prohibit government from endorsing religion. The problem with such an endorsement is that, "when the power, prestige, and financial support of government [are] placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain" (*Engel v. Vitale*, 370 U.S. 421, 431 [1962]).

A second approach is Justice Kennedy's "coercion" test. Its purpose is to clarify the border between accommodation (which he believes is constitutional) and establishment (which he agrees is not). Under his test, there are two things the government may not do: (1) "it may not coerce anyone to support or participate in any religion or its exercise; (2) it may not . . . give direct benefits to religion in such a degree that it 'establishes a religion . . . or tends to do so'" (*County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 660 [1989]). These principles are related, since it would be difficult "to establish a religion without some measure of more or less subtle coercion" in the form of substantial economic help to sustain a faith or "governmental exhortation to religiosity that amounts in fact to proselytizing."

Echoing the ideas of Rehnquist, Kennedy wrote: "government policies of accommodation, acknowledgment, and support for religion are an accepted part of our political and cultural heritage." Furthermore, any test for interpreting the Establishment Clause that "would invalidate long-standing traditions cannot be a proper reading of that Clause." In contrast to *Everson*, Kennedy wrote that, if the federal courts were installed "as zealous guardians of an absolute wall of separation," this would not reflect government neutrality, but government disapproval of religion.

Weisman: *Mixed Judicial Approaches*

Thus, at the beginning of the 1990s, the Court was badly splintered over

the meaning of the Establishment Clause. Several "accommodationist" Justices supported Justice Kennedy's coercion test, which seemed to hold that government accommodation or support of religion was not unconstitutional unless there was coercion or proselytizing. However, other "separationist" judges continued to support the *Lemon* or endorsement test. Then, on November 6, 1991, the extraordinarily controversial case of *Lee v. Weisman*, 112 S.Ct. 2649, 2682 (1992), was argued before the Court.

Weisman involved an invocation and benediction at a Providence, Rhode Island, public school graduation where attendance was voluntary and the prayers by a rabbi were nondenominational and "so characteristically American, they could have come from the pen of George Washington or Abraham Lincoln." This case gave the Court an opportunity to reject *Lemon* and the wall of separation and substitute the coercion test that appeared to allow government to support religion. This seemed not only possible but probable, since three of the Justices deciding *Weisman* had supported Kennedy's coercion test and the Court's newest Justice, Clarence Thomas, was a conservative who also appeared to support the accommodationist view.

But, on June 24, 1992, the Court announced one of its most surprising decisions of the year, voting 5-4 that the graduation prayers violated the Establishment Clause. Even more surprising was that Justice Kennedy, who had previously favored allowing traditional, noncoercive government support for religion, not only voted with the majority but also wrote the opinion of the Court. The case also produced three other opinions, by Justices Scalia, Blackmun, and Souter, that reflect the different approaches to Establishment Clause interpretation that vie for judicial support. The four *Weisman* opinions are summarized and analyzed for separate review on pages 18-20 as reflecting the full range of judicial approaches to the Establishment Clause that have led to the continuing controversy throughout the country.

Establishment Clause Case Comes Before Supreme Court

On March 31, the Supreme Court heard arguments on the constitutionality of a public school district established in 1989 to serve the needs of 220 special education students from the Satmar Hasidic village of Kiryas Joel (KEER-yas JO-el), about 40 miles northwest of Manhattan. To a greater extent than usual, most of the Justices seemed uncertain of the final outcome. The Court is expected to rule on the case before recessing in July.

When the nearby public school district discontinued providing special education teachers to the village's parochial school in 1985, the village refused to allow its disabled children to enter nearby public schools, where they had been previously ridiculed and harassed while attending. In 1989, the New York legislature carved out the special one-building school district from the existing district.

Last July, the New York Court of Appeals ruled that the special school district amounted to a symbolic union of church and state and ordered it dissolved. During the one-hour hearing before the Supreme Court in March, Nathan Lewin, the school district's attorney, argued that the school district is "wholly secular," serving only the disabled students' special needs. New York State Assistant Attorney General Julie S. Mereson called it a "neutral" answer to the needs of these children, who otherwise are entitled to public school services.

The concerns of Justices O'Connor, Kennedy, and Souter that the district may be in violation of the Constitution's Establishment Clause did not seem eased. But Justice Scalia questioned whether religion is really part of the case—whether the state is accommodating the students' cultural, not religious, differences, such as their use of Yiddish, their distinctive dress, and their "isolation from modernity." Jay Worona, counsel for the New York State School Boards Association, argued that the Satmar's culture and religious precepts can't be distinguished, and that the school district is "a political constituency defined by religious lines."

Kiryas Joel was established in 1977 in Monroe, N.Y. The village has its own government, and its 12,000 inhabitants speak and write mostly Yiddish, wear traditional garb and sidelocks, have no English-language publications, and watch no television. All the children who are not disabled attend classes at the village parochial school, where boys and girls are taught in separate facilities.

Weisman's Aftermath

Compliance

What emerges from the diverse opinions in *Weisman* is a 4-4-1 split. Four of the Justices—Blackmun, Souter, O'Connor, and Stevens—are separationists who support the neutrality approach incorporated in the endorsement test. Four other Justices—Scalia, Rehnquist, Thomas, and White—are accommodationists who support the coercion test. And Kennedy is in the middle. He uses the same test as the Scalia group but arrives at the opposite outcome.

The *Weisman* decision has provoked a variety of responses ranging from willing compliance to patriotic defiance. In many communities, school officials were pleased with the decision because they hoped the Supreme Court ruling would finally put an end to this emotional controversy and enable them to focus on basic education. In other communi-

(continued on page 20)

Weisman: Opinion Summaries and Analysis

The four judicial approaches to *Lee v. Weisman* summarized below reflect the range of Establishment Clause interpretations that have led to continuing confusion and controversy throughout the country. The summaries and analysis that follow are taken from Schimmel (1992).

Opinions

Kennedy: *Opinion of the Court*

On behalf of the majority, Justice Kennedy holds that it is unconstitutional for public school officials to be involved in graduation prayers where students are pressured to participate. According to Kennedy, the coercion test prohibits subtle and indirect social and psychological pressure as well as direct coercion.

Kennedy points out several troubling aspects of government involvement in the Providence prayers. First, the principal decided that an invocation and benediction should be given. Kennedy explains that, from a constitutional perspective, the principal's decision "is as if a state statute decreed that the prayers must occur." Second, the principal chose the person to give the prayers, and "the potential for divisiveness" over such a choice is apparent. Third, the principal gave the rabbi nonsectarian guidelines for his prayers; thus, the principal unconstitutionally controlled the content of the prayers, which "is no part of the business of government." Admittedly, the principal tried to make the prayers acceptable to most people. The problem is that no government official should produce any kind of prayer for the graduation.

The Establishment Clause against state involvement in religion is based on the lessons of history. One timeless lesson, writes Kennedy, "as urgent in the modern world as in the 18th Century," is that "if citizens are subjected to state-sponsored religious exercises, the State disavows its own duty to guard and respect" the diversity of religious belief. This is especially true in the public schools where "prayer exercises . . . carry a particular risk of indirect coercion."

Concerning the argument that students are not coerced to attend graduation, Kennedy concludes:

> Law reaches past formalism. And to say a teenage student has a real choice not to attend her high school graduation is formalistic in the extreme. . . . Everyone knows that in our society and in our culture high school graduation is one of life's most significant occasions.

Scalia: *A Scathing Critique*

In his dissenting opinion, Justice Scalia attacks Justice Kennedy's interpretation, reasoning, and conclusions. Prohibiting invocations and benedictions, he writes, "lays waste to a tradition that is as old as public school graduation ceremonies themselves" and is part of a "long-standing American tradition of nonsectarian prayer to God at public celebrations." Scalia is equally harsh in his criticism of the Court's judicial approach. "As its instrument of destruction, the bulldozer of its social engineering, the Court invents a boundless, and boundlessly manipulable, test of psychological coercion." In a disparaging comment about Kennedy's apparent switch of judicial positions, Scalia notes that the majority opinion shows why the Constitution "cannot possibly rest upon the changeable philosophical predilections of the Justices of this Court, but must have deep foundations in the historic practices of our people."

Scalia then provides a history lesson for his colleagues ("Since the Court is so oblivious to our history"), detailing the many ways prayer has been a prominent part of public events including presidential inaugural addresses (from Washington to Bush), the opening of Congressional sessions and the Supreme Court, and, of course, public school graduations. He mocks Kennedy's theory that graduation prayers involve psychological coercion as "psychology practiced by amateurs," and Scalia comments that, in using such a theory, "the Court has gone beyond the realm where judges know what they are doing." Avoiding the politeness and subtlety that often characterizes judicial differences, Scalia dismisses the majority's reasoning as "ludicrous" and "beyond the absurd."

In an unusual and disturbing paragraph, Scalia observes that this case "is only a jurisprudential disaster and not a practical one." He then explains how public schools can subvert the Court's opinion and include graduation prayers by making it clear "that anyone who abstains from screaming in protest does not necessarily participate in the prayers." Following this sarcastic statement, he advises potential evaders to announce that "none is compelled to join" the invocation or benediction "nor will be assumed, by rising, to have done so."

Finally, Scalia concludes with a popular statement about the significance of public prayer: "To deprive our society of that important unifying mechanism, in order to spare the nonbeliever what seems to me the minimal inconvenience of standing or even sitting

in respectful nonparticipation, is as senseless in policy as it is unsupported by law."

Blackmun & Souter: *A Judicial Counteroffensive*

The concurring opinions of Justices Blackmun and Souter are clear and strong reaffirmations of decades of judicial precedent prohibiting government aid to religion. As Rehnquist and Scalia have won increasing recognition of their criticism of the *Lemon* test and the wall of separation, so Blackmun and Souter have led the effort to rejuvenate and strengthen the principle of government neutrality and separation. They do not concede that Rehnquist and Scalia have the better argument based on history. Instead, Blackmun and Souter argue that history, tradition, *and* precedent are on their side.

Thus, Blackmun's concurring opinion emphasizes "one clear understanding" that has emerged from almost 50 years of Supreme Court interpretation of the Establishment Clause: "Government may neither promote nor affiliate itself with any religious doctrine or organization." Applying the *Lemon* test to the facts of this case, Blackmun concludes: "There can be no doubt that the invocation of God's blessing delivered at Nathan Bishop Middle School is a religious activity" planned, supervised, and endorsed by school officials that promotes religion in violation of prior Establishment Clause decisions.

Unlike Kennedy, Blackmun argues that the Establishment Clause requires more than an absence of government coercion. "It is not enough that the government refrain from compelling religious practices," he writes, "it must not engage in them either." Especially in the public schools, the Establishment Clause prohibits "attempting to convey a message" that religion is favored.

Blackmun emphasizes that separation of church and state protects religion as well as government. Attempts to aid religion, even through subtle government pressure, jeopardize freedom of conscience and diminish "the right of individuals to choose voluntarily what to believe." He concludes that "religion flourishes in greater purity without than with the aid of government."

In Justice Souter's long, scholarly concurring opinion, he first asks: can the government favor nondenominational religion? His answer is no. "Forty-five years ago," explains Souter, "this Court announced a basic principle of constitutional law from which it has not strayed: 'that the Establishment Clause forbids aid to all religions.'" Reaffirming that principle, *Weisman* "forbids state-sponsored prayers in public school settings no matter how nondenominational the prayers may be."

Next, Souter examines Rehnquist's argument that the original Framers of the Establishment Clause did not prohibit the government from providing nondiscriminatory aid to religion. After a detailed analysis of the history and development of the Clause, Souter notes that the evidence is mixed, that neither the Framers nor our presidents shared a common understanding of the Establishment Clause. Assessing the conflicting evidence, Souter concludes, "history neither contradicts nor warrants reconsideration of the settled principle that the Establishment Clause forbids support for religion in general no less than support for one religion or some."

Finally, Souter distinguishes graduation prayers to a captive audience from official acknowledgments of religion in public life (such as presidential proclamations or "In God We Trust" on coins), which are "rarely noticed, ignored without effort, conveyed over an impersonal medium, and directed at no one in particular." Souter concludes: "when public school officials . . . convey an endorsement of religion to their students, they strike near the core of the Establishment Clause. However 'ceremonial' their message may be, they are flatly unconstitutional."

Analysis

Interpretation Principles

Weisman illustrates three general approaches to Establishment Clause interpretation. Although differing in emphasis, the concurring opinions of Blackmun and Souter reflect the "separationist" approach that has largely dominated the Court for 40 years. Both Justices support the principle of neutrality that prohibits state support of religion. This is fundamentally different from the approach of the "accommodationists" that is reflected in Scalia's use of the "coercion" test, which does not require neutrality and allows noncoercive government accommodation, encouragement, and support for religion if it is nondenominational.

Kennedy suggests a middle ground. Although he also uses the coercion test, he does so in a very broad fashion that prohibits much of the government support for religion that Scalia would allow. This is because Kennedy prohibits indirect and subtle psychological coercion that forbids the state "involvement" in graduation

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prayers that Scalia's approach permits.

Direction

Until *Weisman*, the Court's change of direction seemed clear. It began in 1985 with Rehnquist's dissenting opinion in *Wallace v. Jaffree*, which included a detailed critique of the *Lemon* test and a call to abandon Jefferson's wall of separation. Then, in 1989, Kennedy articulated his coercion test and was joined in his opinion by White, Scalia, and Rehnquist. When Thomas was appointed to the Court, it appeared that the accommodationist block had a majority of the votes needed to overturn the separationist approach. And it seemed as though *Weisman* was the ideal case to use, since there appeared to be little judicial or popular support for rejecting the rabbi's "all-American" nondenominational graduation prayers. But, in *Weisman*, the unexpected happened; Kennedy sided with the separationists.

As a result, the momentum of the accommodationists was halted, and the direction of the Court in Establishment Clause interpretation is no longer clear. Will Kennedy continue to interpret the coercion test so broadly that he will become consistently aligned with the separationists? Will he become the "swing" vote and develop a flexible, middle position that will vary according to the specific facts of the case? Will he return to the accommodationist camp in out-of-school Establishment Clause cases? Or will the retirement of Justice White (who voted with the accommodationists) and the appointment of Justice Ginsburg (who appears to be a separationist) shift the Court back to a solid separationist majority no matter how Kennedy votes? Only future Court opinions will answer these questions.

History and Tradition

In *Weisman*, Scalia claims that tradition is on his side, that history demonstrates that government-supported nondenominational public prayers have always been a part of our tradition and that the Court's opinion is "conspicuously bereft of any reference to history." However, the other opinions also support their views with historical claims and references. Thus, Blackmun's opinion cites "the history of the [Establishment] Clause," the debates of the Framers of the Clause, and Court decisions that have interpreted that Clause since 1890. And Souter's opinion includes even more historical documentation than that of Scalia. Souter presents a detailed analysis of Establishment Clause cases dealing with state-sponsored prayers, shows that "no adequate historical case" departs from his interpretation, analyzes "the history of the Clause's textual development" since the debates in the First Congress, and explains why "history" does not "warrant reconsideration of settled principle."

While Scalia relies on the historical record of prayers in government ceremonies and proclamations, Souter and Blackmun rely more on the history of Court interpretation of the Establishment Clause and the judicial tradition of following precedent. While there is evidence on both sides, Scalia is wrong in suggesting that only his position is supported by history.

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ties, administrators and board members complied reluctantly. Although they felt that graduation prayers were a positive tradition, they agreed to end such prayers because of legal advice, a threat of suit, or their belief that they should comply with the Court's ruling even if they felt it was wrong.

Defiance

In contrast, there are some school boards that have decided to directly defy the decision because prayer was something the board believed in, because defiance seemed popular (even patriotic), and because no one in their community publicly complained. In the central Michigan community of Mt. Pleasant, this popularity was reflected in a newspaper editorial that applauded the school board's "gutsy stand to defy the Supreme Court" and then concluded:

> While we don't encourage disrespect or disobedience for the law, it's encouraging to witness some old-fashioned belief of "standing up for what we believe in."
>
> We'll bet there are a lot of people here, and everywhere, who want to hold on to some pioneering traditions that carried this nation through many generations. . . traditions that have been cycled out of life by court rulings. *(Editorial, Morning Sun, 14 February 1993)*

The editorial felt no need to explain why defying the Court was not encouraging disobedience for the law. Furthermore, by disobeying laws they believe are wrong, school boards and administrators are providing an unintended but dangerous and powerful message to students to do the same.

Evasion and Avoidance

There also are many communities that are looking for legal ways to evade or avoid the *Weisman* ruling and to continue offering graduation prayers without appearing to directly violate the law. This alternative has been encouraged by a number of factors. First was Justice Scalia's dissenting opinion. Thus, when a Wisconsin

superintendent's plan to have a local minister deliver an invocation at graduation was challenged, he defended himself legally by printing Scalia's statement on the graduation program's cover: "While all are asked to rise for the invocation and benediction, none is compelled to join in them, nor will be assumed by rising to have done so" (Ruenzel 31).

Second was the ruling of a federal appeals court in *Jones v. Clear Creek Independent School District*, 977 F.2d 963 (5th Cir. 1992); *cert. denied*, 113 St. Ct. 2958 (1993), which found graduation prayer constitutional because it was initiated and led by students, not school officials. In June 1993, the Supreme Court declined to review *Clear Creek*, which, according to accommodationists, means that some kinds of graduation prayers are permissible. This ruling has allowed some communities to argue that traditional graduation prayers by local ministers are okay if students rather than administrators invite the clergy.

Frustration

Confusion over graduation prayers was intensified by Pat Robertson's conservative American Center for Law and Justice (ACLJ), which sent a bulletin to the nation's 15,000 public schools last spring claiming that prayer at graduation and other public school events is constitutional as long as it is nondenominational and student initiated. This confusion has been compounded by the American Civil Liberties Union's claim that almost any graduation prayer that school officials tacitly approve by putting it in the program is unconstitutional. Therefore, some administrators feel at risk no matter what they do, so they tend to do whatever the majority of their community wishes. With these legal ambiguities and conflicting political pressures, it is not surprising that many school boards are keeping graduation prayer to please their constituents and calling the ACLJ to provide legal protection.

Implications and Observations for Educators

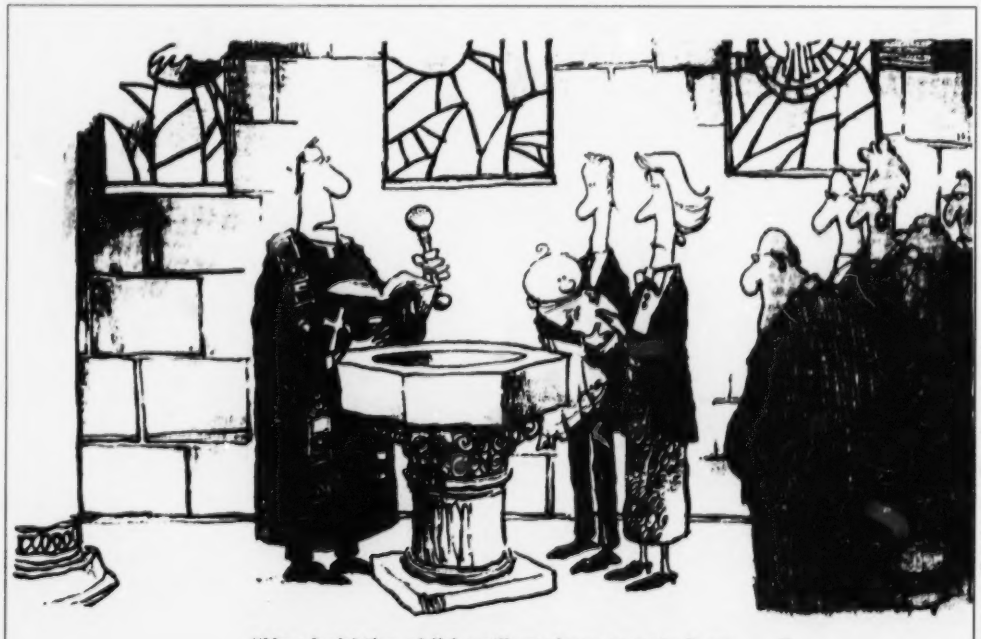
The following observations are based largely on a series of workshops and interviews with teachers and administrators about the Court's interpretation of the Establishment Clause.

Majority Rule

In communities where overwhelming majorities favor school prayer, many voters can't understand why they shouldn't be able to have them. As one midwestern parent asked, "why should a few people on the Supreme Court be able to tell the rest of us what to do?" (Ruenzel 32) These questions challenge educators to do a better job of explaining why the Bill of Rights was designed to place certain fundamental values beyond the reach of the majority, how the tyranny of the majority can be a danger to democracy, and why it is important for the courts to be able to protect the basic rights of dissenting individuals and unpopular minorities.

Degrees of Separation

There is an erroneous tendency to think of those who believe in separation of church and state as sharing one clear, absolutist view. However, recent research indicates that many teachers, administrators, and clergy who say they believe in church/state separation also say they favor graduation prayers. When asked about this apparent inconsistency, they explain that what they mean by separation is prohibiting government funding of churches or religious schools, promoting religion in the public school curriculum, or clergy using the graduation stage to preach sectarian sermons. But this, they say, differs from nonoffensive, nondenominational invocations by different clergy each year. Such prayers they see as part of the American tradition of celebrating public events such as inaugurations and graduations. Although they believe in separation, they explain that they aren't "extremists" or "fanat-



"You hold the child until my lawyer gets here . . ."

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Times Change—Would You?

Here's some information to share with your students to help them understand how governance where there is an established religion can differ from governance where there is separation of church and state. After sharing the information, ask your students to consider how the history of the American colonists and the climate of their times might have influenced the Framers of the Constitution to separate church and state by law.

During colonial times in America, church officials performed many of the roles that government agencies do today. For example, churches operated many schools, and a minister often held classes in his home. Most of the students had to pay fees, however, so that most poor parents could not send their children to school. Instead, they taught their children at home. Besides learning skills that would help support their households, these young colonists had lessons in religious beliefs and obedience.

Generally, all the colonists were deeply religious. In New England, students who were able to attend school often used hornbooks to memorize their lessons. These were boards with a piece of paper glued on and a thin layer of horn overlaid. On the paper were the alphabet, numerals, and the Lord's Prayer.

Many colonists came to America seeking religious freedom, including Puritans, Quakers, Baptists, and Huguenots. Besides supervising education in the colonies, the churches cared for the poor and kept public records such as those for marriage and death. Meetings were held at churches, which were used as community centers for courtship, socializing, and sharing news. Church laws governed colonial activity, and the courts enforced these laws. For example, one law was to observe the Sabbath by not cooking, shaving, cutting hair, or making beds from Saturday afternoon to sundown on Sunday.

For all their religious fervor, colonial groups were often intolerant of other groups and would not allow them the freedom to follow their own beliefs. In most colonies, voting and other rights were restricted to members of a certain church group. In royal colonies like Georgia, for example, citizens were expected to belong to the Anglican Church. Puritans in New England denied citizenship to Quakers and others. Roman Catholics and Jews could not vote in most colonies.

ics" in their beliefs and that it is no more unreasonable to limit the concept of separation than to limit freedom of speech or religion.

Religious Separationists

Just as there are separationists who favor graduation prayers, so there are many who oppose school prayer for religious reasons. Because the plaintiffs in some prominent prayer cases were atheists, there is a tendency to assume that the school prayer conflict is between religious believers on one side and atheists, agnostics, and antireligious humanists on the other. It is important for educators to correct this false portrait and explain why many religious people are separationists.

Historically, Rhode Island's Roger Williams saw separation as a way to protect the churches against state control and "worldly corruption." Today, many share the view that what the government promotes, the government may control and that it is dangerous to allow secular, political authorities in schools or communities to influence and potentially politicize and secularize religion. As Justice Blackmun noted in *Weisman*, "religion flourishes in greater purity without than with the aid of government." Furthermore, some religious sociologists have found that Americans are more religious than citizens of European countries, including those with government-supported churches and religious schools (see, for example, Hatch 210-11). Some conclude that the reason for the greater popularity of religion in America is that, since American churches cannot depend on government support, they are more responsive, relevant, and committed to their members.

This was illustrated by events in a small New England town. When a threat of suit forced the local public school to discontinue its traditional graduation prayers, all of the town's churches joined together to reinvigorate the pregraduation baccalaureate service that had attracted fewer students and parents during recent years. When I interviewed townspeople about the graduation prayer decision, they urged me to come to the baccalaureate service that had become a popular "standing room only" community celebration. Thus, the baccalaureate was transformed from a sparsely attended, little noticed event to one of widespread pride and participation because the government no longer sponsored graduation prayers.

Misinterpreting Separation

Some educators have misinterpreted Supreme Court rulings to mean that public schools should prohibit all religious ideas, books, and symbols. This has led to students being told they could not read their Bible on a school bus and that they could not write religious messages on their valentine cards. Because of this type of misunderstanding, it is important for students, teachers, and administrators to be reminded that the Establishment Clause prohibits only school-sponsored religious activity, not private prayer or the expression of a student's personal religious views.

It is also important to point out

that the Supreme Court has carefully distinguished between public schools' teaching or promoting religion (which is prohibited) and teaching about religion (which is not). Thus, in *Abington v. Schempp*, 374 U.S. 203 (1963), the Court noted that a person's education may not be complete "without a study of comparative religion or the history of religion and its relationship to the advancement of religion." Similarly, the Court wrote that "the study of the Bible or of religion, where presented objectively as part of a secular program of education" would not violate the Establishment Clause.

Judicial Inconsistency

Students and teachers often ask about the inconsistent way the Establishment Clause seems to be interpreted by the courts; for example, allowing invocations at presidential inaugurations but not at high school graduations. While the Supreme Court sometimes has seemed inconsistent in its Establishment Clause decisions, the Court has always maintained a higher wall of separation in cases involving the public schools. This, explained the Court, is because of the central and delicate role of the public schools in American life, because students are compelled to attend, and because they are at a formative and impressionable age.

There is a danger that the constitutional differences discussed here may obscure the broad judicial and popular consensus that distinguishes the United States from the many nations that provide direct support to religious institutions, where a citizen's national identity is tied to religion, and where those who are members of minority religions are considered second-class citizens. Reasonable judges, lawyers, and educators in America differ about how separate church and state should be. Yet, almost everyone agrees that there should be some, but not total, separation. Thus, just as ardent separationists agree that the government should provide fire and police protection for religious institutions, so most accommodationists do not believe that public schools should write sectarian prayers for their students or that students should be penalized for not praying.

Lessons in Constitutional Values

The issues surrounding school prayer provide educators with an excellent opportunity to teach students how to approach controversial issues in a pluralistic society. Rather than avoiding controversy, our public schools can serve as laboratories for teaching tolerance and for modeling how diverse people can discuss their differences in an atmosphere of mutual respect. The goal of such discussions is not to seek superficial or false agreement about serious differences; rather, it is to help students understand views with which they disagree. In the relatively protected classroom environment, teachers can help students learn that people can disagree with them without being disagreeable, stupid, or sinful and that most constitutional controversies are not simply issues of right against wrong, but of legitimate values in conflict. If we fail to teach religious tolerance in the classroom, we will increase the name calling and polarization that occurs when students leave school, cluster with like-minded family and friends, and hurl escalating rhetoric at those with whom they disagree.

Many people are upset about the school prayer cases (and what they see as "the expulsion of God from the public schools") as symbolizing the elimination of traditional values in the curriculum and the substitution of moral relativism. Thus, the challenge for educators is to identify and teach those basic American values about which most opponents and proponents of school prayer can agree. One place to begin is with fundamental constitutional values such as freedom and tolerance embedded in the First Amendment and justice and fairness embedded in the Fourteenth Amendment. It also might be appropriate to consider how these values are rooted and reinforced in both our biblical and constitutional traditions.

Need for Thoughtful Curriculum

As we enter our third century under the protection of the wall of separation, it is unclear whether that structure will continue to withstand the forces that seek to destroy it. These forces include the energy, commitment, and intelligence of those who sincerely believe that its destruction will promote the common good. They also include widespread ignorance, distortion, and misunderstanding about the purposes and effects of the Supreme Court's Establishment Clause decisions. Thus, a more thorough and thoughtful curriculum about the wall of separation is urgently needed. Such a curriculum should explain the reasons why majorities may not override constitutional rights, the importance of tolerance in our pluralistic democracy, and the principles underlying the Supreme Court's Establishment Clause decisions. These lessons can reduce the ignorance, confusion, and misunderstanding that continues to plague our public debate about the delicate relationship between church and state in America. □

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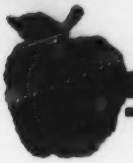

Teaching Strategy

The Establishment Clause: Challenges and Interpretations

Stephen A. Rose

Background

This strategy is designed to translate key concerns and issues of the Establishment Clause debate into a series of learning opportunities for secondary students. The instructional sequence will promote student deliberation and decision making about whether the "wall of separation" needs to be kept high or whether it should be lowered to accommodate certain forms of nondenominational religion at civic occasions.

To learn about the wall of separation, students will (1) study the Supreme Court's interpretations of the Establishment Clause, (2) explore why some Justices want to reconsider the degree of separation between church and state, and (3) make decisions about the constitutionality of clergy delivering prayers at public school graduation ceremonies.

Objectives

Students successfully completing these lessons will be able to:

- specify how the Establishment Clause is designed to protect freedom of religion
- identify and explain how the cases of *Everson v. Board of Education of the Township of Ewing* (1947), *Lemon v. Kurtzman* (1971), and *Wallace v. Jaffree* (1985) contributed to the Court's interpretation of the Establishment Clause
- apply past precedents concerning the Establishment Clause to their reasoning about the 1992 Supreme Court decision in *Lee v. Weisman*
- examine and apply the arguments of Justices Kennedy, Scalia, Blackmun, and Souter in *Lee v. Weisman*
- formulate reasoned views about the Establishment Clause and apply them to *Jones v. Clear Creek independent School District* (5th Cir. 1992)

Target Group: Secondary students

Time Needed: 2-4 class periods

Materials Needed

- Teacher-prepared transparency: "The First Amendment" (see 1 in "Procedures" below)
- Teacher-prepared handout, "Student-led Graduation Prayer" (see 6 in "Procedures" below)
- Student handouts 1-7

Procedures

1. Introducing the Issues

Prepare a transparency with the text of the First Amendment to the Constitution, or copy it onto the chalkboard when indicated below.

The First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Open the class by asking whether a clergy member should be permitted to say prayers at a public school graduation ceremony. Have students share and discuss their opinions. Then ask whether it is constitutional to have clergy deliver prayers at public school graduation ceremonies.

Present the First Amendment to the class. Underline the religion clauses. Define and explain all relevant terms and phrases. Then have students share their initial views about whether having clergy deliver prayers at public school graduation ceremonies is constitutional. Conclude by having students write their initial opinions.

2. Establishing a Case History

- Distribute Student Handout 1, "Matrix of U.S. Supreme Court Decisions," to the class. Through lecture and discussion, address the issues and precedents organized in the matrix.

  The matrix specifies some of the key features of each case. Be sure to explore the reasons for the unanimous and strong support for the wall of separation in *Everson*. Then explain why it was a landmark case, how the wall of separation applied

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Note: This strategy assumes that instructors have read David Schimmel's article "From Consensus to Confusion: Should the Wall of Separation Be Demolished or Rebuilt?" in this edition, and that they have a working knowledge of his analysis of constitutional issues and precedents pertaining to this debate. See the article for full citations to cases used here and for further detail about the information in Student Handout 1. In addition to Schimmel's article, other information sources for the student handouts include Schimmel's "Graduation Prayers Flunk Coercion Test: An Analysis of Lee v. Weisman*," which is sourced in his bibliography; and the Supreme Court decision in* Lee v. Weisman *(1992). In constructing the handouts, much of the language the Justices used was modified.*

to the specific issues of the case, and how the precedent set in the case guided the Court for over two decades of Establishment Clause jurisprudence.

- Next, introduce students to *Lemon v. Kurtzman* and the three-part test that was formulated in the majority opinion. Offer hypothetical cases so that students can apply the test. Alternatively, have pairs of students develop hypothetical cases and then apply the *Lemon* test. Be sure to explain how this case marks the beginning of the erosion of consensus among Justices for the strong wall of separation established in *Everson*.
- Explain to students that Justice Rehnquist's bold dissent in *Jaffree* represents an interpretation of the Establishment Clause that is very different from the one originally articulated in *Everson*. Also explain that Justices O'Connor and Kennedy have offered still other interpretations of the Establishment Clause.
- Ask students to reconsider their previous opinions regarding the constitutionality of public school graduation prayers in light of the information you have presented.

3. Broadening Student Reasoning

- Distribute Student Handout 2 and have the students read it. Then check their understanding of its facts and arguments. For example, what are *Weisman*'s concerns? What actions did the school take in response to Mr. Weisman's requests? Who decided to have an invocation and benediction? Who selected the clergy? Who gave guidelines for the prayers? What did the prayers say? What did school officials argue? What were the decisions and supporting arguments of the federal, district and appellate Courts?
- Ask students, if they were Supreme Court Justices, what would be their decisions in this case and what reasons would they offer for support? Have students individually write their initial decision, and tell them that they will be sharing their ideas with others.
- Divide the class into "courts" of 4-5 students. Ask each court to develop a decision complete with arguments. A useful method to follow is to have students: (1) identify and analyze the facts of the case, (2) determine the constitutional or legal issues that arise out of the case, (3) develop an argument that incorporates the critical facts, circumstances, and issues, as well as the court precedents, laws, and constitutional interpretations that support their position.
- Have the courts write their decisions using a bulleted outline that incorporates 1, 2, and 3 immediately above. If a court cannot agree unanimously, majority and dissenting opinions with arguments will need to be written.
- When the courts are finished, conduct a class discussion to bring out various viewpoints about the case. Specifically, each court should share its decision(s) and supporting arguments with the class, summarizing them on the chalkboard. Each court should be given time to reevaluate its arguments in light of the information that was presented to the class. Any modifications should be incorporated into the court's written decision.

4. Acquiring New Information

This procedure is designed to have students gain new information about the judicial opinions in *Lee v. Weisman*, which are summarized in Student Handouts 3-6 as "Justice A," "Justice B," "Justice C," and "Justice D." At this point in the lesson, it is unnecessary to identify the Justices. However, for the teacher's information, the opinions represented are those of Justices Kennedy (A), Scalia (B), Blackmun (C), and Souter (D).

- Assign students in fours to "expert" groups. As possible, make sure that each group represents a mixture of student ability and gender. Assign each group to one of the "opinion" handouts and give a copy to each group member. Tell the groups that they are to become experts on their Justice's opinion.
- Distribute Student Handout 7, "Expert Questions for the Justices," to each student. This handout contains five questions about each Justice's opinion. At this time, expert groups will answer only the questions related to their assigned Justice. These questions will help each group develop relative expertise on the ideas and arguments of their Justice's opinion. The questions will also help guide students in teaching others later in this lesson.
- Have each expert group consider and discuss all the questions pertaining to their Justice's opinion. Tell students to take notes on what they determine are the answers, as they will use these to teach others their Justice's views. To prepare for teaching, students may wish to practice what they are going to say.
- Once all groups have the appropriate expertise on their assigned Justice, reassign students to new groups so that there is one representative from all the former groups in each new group. Hence, each new group will have four students, each of whom is an expert on a particular Justice's opinion. The task is for the students in each group to teach other members about their Justice's opinion and arguments in *Weisman*. At the end of this activity, each group will be knowledgeable about the Court's main opinions.
- Use Student Handout 7 to conduct a class discussion where students compare and contrast the four opinions.

5. Revising Student Court Opinions

- Have students reconvene into their original "courts." Each court possesses a degree of depth about the Supreme Court's interpretations of the Establishment Clause and the resulting arguments made in *Weisman*. This information should be juxtaposed with the student courts' initial decisions and arguments so that a reexamination can be made

(continued on page 28)

Student Handout 1: Matrix of U.S. Supreme Court Decisions

Justice/Case	Establishment Clause Viewpoint	Implications/Other
Black delivered majority opinion *Everson v. Board of Education* (1947)	All nine justices agreed with Thomas Jefferson that "the clause against establishment of religion by law was intended to erect a wall of separation between church and state."	All the justices strongly supported the principle that church and state should be separate. Twenty-four years followed of virtual consensus that the Establishment Clause called for *strict* separation between church and state. The first time the U.S. Supreme Court determined what an establishment of religion was.
Burger delivered majority opinion *Lemon v. Kurtzman* (1971)	Chief Justice Burger repeatedly said the meaning of the Establishment Clause was not clear. It "is opaque" and "we can only dimly perceive the lines of demarcation . . . "	The three-part test was developed to determine whether the Establishment Clause had been violated. For a law or government policy or practice not to do so: (1) It must not have a religious purpose; (2) Its effect on religion must be neutral—i.e., the law must not advance or inhibit religion; (3) It must not foster excessive government entanglement with religion. In this case, the previous consensus began to erode. The three-part test became known as the *Lemon* test.
Rehnquist offered strong dissent *Wallace v. Jaffree* (1985)	Justice Rehnquist raised three important issues with regard to the *Lemon* test: (1) The secular purpose part is difficult to apply because how the test was to operate had never been clearly stated or defined; (2) The entanglement part requires for state financial aid to parochial schools to be closely supervised, which in effect creates government entanglement with religion; (3) The *Lemon* test has led the Court to make confusing and contradictory rulings about the Establishment Clause.	Rehnquist believes that the Court has misinterpreted the meaning of many historical events, all of which pertain to the Framers' concept of the Establishment Clause. He rejects the *Lemon* test in its entirety. If a majority of the Court eventually agrees with him, it would represent a complete rejection of the underlying principles of the test and over 40 years of Court precedent of separation of church and state as a basic constitutional value. The growing Court division was expressed in Rehnquist's strong dissent, which was a full-blown attack on the foundations of the *Lemon* test.
O'Connor *Lynch v. Donnelly (1984); Wallace v. Jaffree* (1985)	Justice O'Connor wants to refine the *Lemon* test with the endorsement test, which would focus on whether government actions endorse religion. She would replace the *Lemon* test's "excessive entanglement" part with what she calls the purpose and effects test, which would ask two questions: (1) Is the purpose of the government statute or practice to endorse religion? (2) Does the statute convey a message of endorsement?	According to O'Connor, the endorsement test does not preclude government acknowledgment of religion, but it does prohibit government endorsement of religion. She maintains that, if the endorsement test is grounded in history and the language of the First Amendment, it could be consistently applied. Government endorsement of religion sends the message to nonbelievers that they are outsiders, not full members of the political community. Endorsement sends the accompanying message to believers that they are insiders. When government endorses a particular religion or denomination, it places indirect coercive pressure on religious minorities to conform to government- endorsed religion.
Kennedy *County of Allegheny v. American Civil Liberties Union (1989)*	Kennedy proposes a coercion test. Its purpose is to clarify the border between what is government accommodation of religion and establishment of religion. Under this test, government may not: (1) coerce anyone to support or participate in any religion or its exercise; (2) give direct benefits to religion in such a degree as to establish religion or tend to do so.	Accommodation of religion is constitutional, but establishment of religion clearly is unconstitutional.

Student Handout 2: *Lee v. Weisman*

In June 1989, Robert E. Lee, Principal of Nathan Bishop Middle School in Providence, Rhode Island, invited Rabbi Leslie Gutterman to deliver the invocation and benediction at the graduation ceremony to be held that month. This action was consistent with the school board policy permitting principals to invite members of the clergy to give invocations and benedictions at middle and high school graduation ceremonies. As with all clergy, Rabbi Gutterman was provided with a pamphlet entitled "Guidelines for Civic Occasions," which contains recommendations for prayers at nonreligious civic ceremonies. The prayer delivered at the invocation and benediction began with God, made numerous references to God, and ended with *amen*.

Daniel Weisman, the father of soon-to-be graduate Deborah, objected to the invocation and benediction. He believed he had good reason to be concerned. Three years before, when he had attended his older daughter's graduation from the same school, a Baptist minister had presided over the invocation and benediction. The minister had enthusiastically led the audience in prayers and ended the program by having the audience stand in a moment of silence to give thanks to Jesus Christ. Weisman, who was Jewish, had felt terribly uncomfortable and thought it was inappropriate for a public school to sponsor such a prayer.

Afterward, Weisman wrote a letter of complaint to school officials, but he received no response. When it came time for Deborah to graduate, he decided to renew his complaint. After a series of letters and calls, and a meeting with Principal Lee, Weisman was told that, since a rabbi would be giving the invocation and benediction at the ceremony, Weisman should not be disturbed.

Believing that the school was violating the First Amendment, Weisman filed a motion for a temporary restraining order in U.S. District Court four days before the graduation ceremony. Specifically, he thought the school was sponsoring religion and that it was violating the separation of church and state because it was funded by public taxes and supported by state and local laws. Because of the short time left until the ceremony, the temporary restraining order was denied. The graduation program at Nathan Bishop Middle School took place, and Rabbi Gutterman delivered these prayers:

INVOCATION

God of the Free, Hope of the Brave:

For the legacy of America where diversity is celebrated and the rights of minorities are protected, we thank You. May these young men and women grow up to guard it.

For the liberty of America, we thank You. May these new graduates grow up to guard it.

For the political process of America, in which all its citizens may participate, for its court system where all may seek justice, we thank You. May those we honor this morning always turn to it in trust.

For the destiny of America we thank You. May the graduates of Nathan Bishop Middle School so live that they might help to share it.

May our aspirations for our country and for these young people, who are our hope for the future, be richly fulfilled.

Amen.

BENEDICTION

O God, we are grateful to You for having endowed us with the capacity for learning which we have celebrated on this joyous commencement.

Happy families give thanks for seeing their children achieve an important milestone. Send Your blessings upon the teachers and administrators who helped prepare them.

The graduates now need strength and guidance for the future; help them to understand that we are not complete with academic knowledge alone. We must each strive to fulfill what You require of us all: To do justly, to love mercy, to walk humbly.

We give thanks to You, Lord, for keeping us alive, sustaining us and allowing us to reach this special, happy occasion.

Amen.

One month later, Weisman sought a permanent injunction against prayer at all school district graduations. In court, school officials maintained (1) that the rabbi's message, rather than being a prayer, was inspirational and appropriate for the solemn and important event; (2) that, for a prayer to violate the Establishment Clause, students would have to be coerced into praying; (3) that attendance at graduation ceremonies is voluntary and participants at the graduation could choose not to be there if they found prayer offensive; and (4) that prayers at civic occasions have a long history of acceptance in our country. Chaplains regularly say a prayer at the opening of state legislative sessions; in speeches before the nation, Presidents ask God for guidance; and even federal courts open with "God save the United States and this Honorable Court."

The U.S. District Court for Rhode Island granted the injunction. The court believed that reference to a deity constituted prayer at a public school graduation ceremony and thus was unconstitutional, as it violated the separation of church and state.

The U.S. Court of Appeals found that the graduation invocation and benediction had to meet three conditions to be ruled constitutional: (1) They must not have a religious purpose; (2) They must not advance or inhibit religion; and (3) They must not foster excessive government entanglement with religion.

The appeals court supported the district court ruling that the invocation and benediction were by nature religious and that they were prayers in that they invoked God over the proceedings and blessed them. The court ruled that the Providence schools in effect advanced religion in general by authorizing an appeal to a deity at a public graduation ceremony.

of the initial supporting facts, relevant constitutional and legal issues, and precedents.

- Have the courts write their decisions and deliver them to the class. Then identify which Justices' opinions are represented in the Student Handouts 3-6. Conduct a class discussion that compares the courts' decisions and arguments with those of the Supreme Court. Conclude by asking students what the implications of these opinions are for a continued wall of separation in general. And, specifically, how does this constitutional issue apply to prayer at public school graduation ceremonies?

6. Applying Supreme Court Precedents

Use the graduation prayer case below (1) to evaluate your students' knowledge about the Establishment Clause and recent Supreme Court precedents about prayer at public school graduations and (2) to develop their logical reasoning abilities associated with applying knowledge to a new situation. Information for the case has been drawn from *Jones v. Clear Creek Independent School District*.

Distribute and have students read copies of the case. Then ask, is it constitutional for students to follow a school board policy that allows them to elect to have a graduation benediction and invocation?

Student-led Graduation Prayer

The Board of Education of Clear Creek Independent School District adopted a resolution permitting high school seniors to include a student-written and -led invocation and benediction at their graduation ceremony, if the majority of the senior class so votes. In the event students vote to have an invocation, it shall be nonsectarian and nonproselytizing and conducted by a student volunteer.

Student Handout 3: Justice A

The question before this Court is, can members of the clergy offer prayers as part of official public school graduation ceremonies and be consistent with the religion clauses of the First Amendment?

Public school officials are agents of the state. Specifically, Principal Lee decided that an invocation and benediction should be given, chose the clergyperson who delivered the prayers (Rabbi Gutterman), and controlled and directed the content of the prayers by giving the rabbi guidelines for nonsectarian prayers. This conflicts with a cornerstone principle of the Establishment Clause that it is not part of the business of the government to compose prayers for any group of people.

The First Amendment's religious clauses mean that religious beliefs are too precious to be controlled by the state. By design, the Constitution leaves the business of preserving and transmitting religious beliefs to private individuals and not the government. Religion is to be protected from government interference. A lesson from history teaches us that, if citizens are subjected to state-sponsored religious exercises, the state disavows its own duty to guard and respect the diversity of religious beliefs. Considering the case before us, this lesson is particularly relevant. When these principles are applied to the present case, we find that prayer exercises in elementary and secondary schools carry a particular risk of indirect coercion from peers, teachers, and long-held community beliefs and traditions.

The Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise. In this case, the school's sponsorship and supervision of the graduation places public as well as peer pressure to stand during the invocation and benediction, and this may violate what a student believes, particularly if the person is of a different religion or a nonbeliever. This constitutes indirect and subtle pressure on students to participate. While the pressures may be indirect, their effects are still coercive, and this is prohibited by the Establishment Clause. The freedom of conscience of students needs to be protected from peer, school, and other pressures (coercion) that arise from this ceremonial occasion to participate in school-sponsored prayer exercises.

The petitioners have placed several arguments before the Court that I reject. First, some say that nonsectarian prayer at public ceremonies should be part of this country's civic religion and should be tolerated where sectarian prayers are not. This conflicts with the central meaning of the religious clauses of the First Amendment. The idea that government may establish a civic religion that is nonsectarian as a means of avoiding the establishment of religion is itself a contradiction, and this is not acceptable.

Second is the argument that prayer is like free speech, where all views can be heard by the individual. Therefore, religious dissenters should tolerate prayers at graduation just as public school students must learn to tolerate ideas that they disagree with in the classroom. This line of reasoning overlooks fundamental but different ways the First Amendment protects both speech and religion. Speech is protected by allowing its full expression and government participation; religion, by disallowing government intervention.

Third, some argue that the graduation exercises are voluntary, so that students who do not want to pray or who are offended by prayer do not have to attend. Hence, no coercion. This argument lacks all persuasion because law reaches past formalism. And to say a teenage student has a real choice not to attend her/his high school graduation is formalistic in the extreme. Everybody knows that in our society and in our culture high school graduation is one of life's most significant occasions. Attendance may not officially be required, but are students really free to be absent from their graduation? Absence from such an event amounts to giving up the intangible benefits which have motivated the student through youth and all her/his high school years.

Student Handout 4: Justice B

The Establishment Clause must be construed in light of the government policies of accommodation, acknowledgment, and support of religion that are an accepted part of our political and cultural heritage. Any interpretation of the Establishment Clause that would invalidate long-standing traditions cannot be a proper interpretation of the Clause.

I find it dangerous to interpret the Constitution on philosophical grounds because these views change over time and they cannot possibly give us an accurate view of what was intended by the Framers. This can only be revealed through the historic practices of our people. The history and tradition of our nation have numerous examples of public ceremonies featuring prayer of thanksgiving and petition. From our nation's origin, prayer has been a part of governmental ceremonies and actions. For example:

- The Declaration of Independence, the document marking our birth as a separate people, "appealed to the Supreme Judge of the world . . . " and vowed "a firm reliance on the protection of divine providence."
- George Washington swore his oath of office on a Bible and made prayer a part of his first official act as president: "it would be . . . improper to omit in this first official act my fervent supplications to that Almighty Being who rules the universe, who presides in the councils of nations . . . "
- Thomas Jefferson's prayer in his first inaugural address asked for guidance from "that Infinite Power which rules the destinies of the universe, our council to what is best . . . "
- James Madison, in his first inaugural address, placed his confidence "in the guardianship of the Almighty Being whose power regulates the destiny of nations . . . "
- The tradition of prayer at presidential inaugurations has continued to the present.

Two other branches of Government have a long-established practice of prayer at public events:

- The day after the First Amendment was proposed, Congress urged President Washington to proclaim a day of thanksgiving and prayer "to almighty God."
- Congressional sessions have opened with a chaplain's prayer ever since the First Congress.
- The Supreme Court opens its own sessions with the invocation "God save the United States and this Honorable Court"; it has done so since John Marshall's days.

Just as historic practices and understandings are the keys to interpreting the Establishment Clause, they play a key role in the case before us. The graduation ceremonies in Providence Public Schools that have invocations and benedictions are part of a long-standing American tradition of nonsectarian prayer to God at public celebrations. I believe prohibiting invocations and benedictions at public secondary school promotion and graduation exercises lays waste to a tradition that is as old as graduation ceremonies themselves. The first such ceremony took place in Connecticut in July 1868.

I reject the argument that students were coerced to participate in prayer by peer pressure and the social importance of the occasion. Certainly students who graduate from high school are of an age where they may assert their free will to sit and not participate in prayer while others stand and pray. That the record of this case has not shown that students were prevented from exercising their free will not to pray further weakens the argument that students were coerced to participate in prayer.

Even if all of this resulted in some form of psychological coercion, from a constitutional perspective it has no weight. Peer pressure coercion was not the kind of coercion the Establishment Clause was intended to prohibit. Rather, the Clause prohibits coercion brought about by state churches, financial support for churches by law, and threat of penalty for not attending by law. This Clause also prohibits state endorsement of sectarian religions.

Some have characterized the school official's actions as directing a formal religious exercise, and directing and controlling the content of Rabbi Gutterman's prayers. Nothing in the record remotely suggests that school officials ever drafted, edited, screened, or censored graduation prayers, or that Rabbi Gutterman was ever the mouthpiece of school officials. Rather, all the record shows is that Principal Lee, like other principals in Providence Public Schools, exercised his authority to invite a member of the clergy to deliver an invocation and benediction at graduation ceremonies, offered advice that the prayer should be nonsectarian, and gave the clergyperson a pamphlet from the National Conference of Christians and Jews that gave advice on prayers appropriate for civic occasions.

While this case brings many constitutional issues to the Court, practically speaking, public schools will be able to give invocations and benedictions next June as they have for a century and a half so long as school authorities make clear that anyone who abstains from screaming in protest does not necessarily participate in the prayers. All that is needed is an announcement at the beginning of the graduation program, that while all are asked to rise for the invocation and benediction, none is compelled to join in them, nor will be assumed, by rising, to have done so.

Public prayer is important to religious people of all faiths. To deprive our society of this unifying mechanism in order to spare a nonbeliever what is a minimal inconvenience of standing or sitting in respectful nonparticipation, is as senseless in policy as it is in law.

Student Handout 5: Justice C

One clear understanding has emerged from almost 50 years of Supreme Court interpretation of the Establishment Clause: Government may neither promote nor affiliate itself with any religious doctrine or organization.

Recent decisions of this Court have concluded: neither a state nor the federal government may pass laws that aid one religion or aid all religions. The First Amendment forbids the use of the power or the prestige of government to control, support or influence religious beliefs and practices

In every case involving religious activities and public schools, this Court has applied the *Lemon* test. Application of this test to the facts of this case are straightforward. There can be not doubt that the "invocation of God's blessings delivered at Nathan Bishop Middle School" is a religious activity. The nature of prayer has always been religious. The question is whether the government has placed its official stamp of approval on the prayer. The facts of the case indicate government approval. The school officials (government) composed the official prayers, selected a member of the clergy to deliver the prayers, had the prayers delivered at a public school event that was planned, supervised and given by school officials.

The Establishment Clause requires more than just the absence of coercion. It is not enough that the government does not compel people to practice religion; government must not engage in religious practices itself. In the present case, government (the public school) is attempting to convey a message that a religion or religious belief is favored or preferred. When government endorses a religion, it sends a message to nonbelievers that they are outsiders and not full members of the political community. Our government cannot be premised on the belief that all persons are created equal when it asserts God prefers some over others.

The separation of church and state protects religion as well as government. Religious freedom cannot exist without a free democratic government, and such a government cannot continue when there is a fusion of religion and political regime. Religious freedom cannot thrive in the absence of a vibrant religious community, and this community cannot prosper and grow when government endorses one religion over another. Therefore, this Court has prohibited government endorsement of religion whether or not citizens were coerced to conform.

Student Handout 6: Justice D

Forty-five years ago, this Court announced a basic principle of constitutional law from which it has not strayed—the Establishment Clause forbids government practices that aid all religions. Reaffirming that principle in this case forbids state-sponsored prayers in public school settings no matter how denominationally neutral the prayers may be.

Some have challenged this precedent by reading the Establishment Clause to permit government promotion of religion so long as the government does not prefer one religion or denomination over another. They assert that the original understanding of the Framers of the Establishment Clause did not require government neutrality between religion and irreligion, nor did it prohibit the government from providing nondiscriminatory aid to religion. While there may be some evidence to support this position, a more powerful and overwhelming argument against it lies in the analysis of the many drafts of the religion clauses in the First Amendment which indicate that the Framers of the Establishment Clause intended to prohibit nonpreferential as well as preferential aid to religion.

While many of the early presidents offered inaugural and Thanksgiving Day addresses, they were not always consistent about religion. For example, Thomas Jefferson offered prayers at his inaugural addresses but refused to issue Thanksgiving proclamations of any kind because he thought they violated the religion clauses of the First Amendment. President Madison was inconsistent: sometimes he called for Thanksgiving Day prayers but later doubted their constitutionality. My reading of history, then, suggests that history neither contradicts nor supports reconsideration of whether the Establishment Clause forbids government support of any one or all types of religion.

It is further argued by those who want government to accommodate religion that government should be able to support nondenominational religion. I find this idea to be highly problematic, as government would have to investigate which religious practices would be permissible and which practices would not. To determine these would engage the Court in comparative theology, a practice that would entangle government with religion.

Accommodation does not mean that government may sponsor prayers. It is only appropriate when government lifts a law or practice that has served as a barrier or burden to the free exercise of religion. This type of accommodation was provided when the Court freed Amish children from some of the compulsory education laws.

It has been argued that government may sponsor religious belief as long as it does not coerce support for religion or participation in religious exercises. I believe that this approach to coercion would require us to abandon our settled law. Numerous court decisions, for years, have declared unconstitutional many noncoercive state laws and practices that convey the message of religious endorsement. Under the coercion test, it is unconstitutional for public school officials to be involved with prayers where students are induced to participate through public or peer pressure.

When public school officials convey that they endorse religion to their students, they strike near the core of the Establishment Clause. No matter how ceremonial their message may be, they are flatly unconstitutional.

Student Handout 7: Expert Questions for the Justices

Justice A

1. What is the Justice's opinion about the relationship between government and religion? Why is it important to protect religion from government, and government from religion?
2. What does the Justice say about coercion and students' freedom of choice to attend and participate in graduation exercises that have invocations and benedictions?
3. What differences does the Justice note between freedom of religion and freedom of speech in civic ceremonies like high school graduations?
4. What does the Justice think about nonsectarian prayers being offered at civic and public ceremonies like graduations?
5. What arguments before the Court does the Justice reject? Why?

Justice B

1. What is the Justice's opinion about the relationship between government and religion? May government accommodate and acknowledge religion?
2. What is the Justice's viewpoint about the relationship of long-standing American traditions and an accurate interpretation of the Establishment Clause?
3. According to the Justice, are invocations and benedictions at public high school graduation ceremonies inconsistent with what was intended by the Establishment Clause?
4. What is the Justice's viewpoint regarding coercion? According the Justice, were students coerced to engage in prayer at the graduation ceremony?
5. What advice does the Justice offer school officials who want to hold future graduation ceremonies with invocations and benedictions?

Justice C

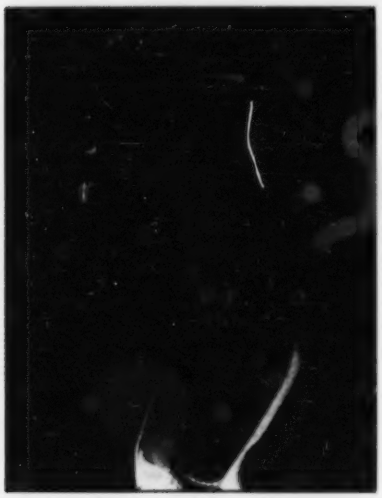
1. According to the Justice, what is the clear understanding that has emerged from over 50 years of U.S. Supreme Court interpretations of the Establishment Clause?
2. What is the Justice's viewpoint about the results of the application of the *Lemon* test in this case? Did the government place its stamp of approval on prayer?
3. What types of coercion does the Justice view as prohibited by the Establishment Clause? Was coercion a factor in the present case?
4. According to the Justice, how does the separation of church and state protect both religion and government?
5. What does the Justice say about the relationship between a free democratic society and religious freedom?

Justice D

1. What is the Justice's viewpoint on the relationship between government and religion? on government accommodation of religion?
2. According to the Justice, may government promote religion if it doesn't discriminate among religions, or must government always be neutral in religious matters?
3. What does the Justice say about the role of traditional American practices that give meaning to the Establishment Clause?
4. What arguments does the Justice reject? Why?
5. According to the Justice, were students coerced into participating in high school graduation prayer in this case?

Brown v. Boar

A Pictorial History of Pub



As narrated by

Margaret Bush Wilson

Chair of the American Bar Association Special Committee on Youth Education for Citizenship

In May 1954, when the U.S. Supreme Court handed down its momentous decision to desegregate public schools in *Brown v. Board of Education of Topeka*, Margaret Bush Wilson was a young attorney and mother living at her parents' home in St. Louis with her husband and four-year-old son. No one knew that she was to become nine-term Board Chair of the National Association for the Advancement of Colored People (NAACP), nor that the Supreme Court was about to strike down *Plessy v. Ferguson*, the 1896 Court decision which held that the doctrine of "separate but equal" in public facilities was constitutional. Now, to commemorate the 40th anniversary of that historic milestone in this nation's quest to live up to its creed, Mrs. Wilson shares with us her perspectives on the case, as a "private" and a "public" citizen who has devoted her professional life to the advancement of equality in our nation.

In talking about *Brown v. Board of Education of Topeka*, it's helpful first to look at the civil rights climate in 1954 and the years immediately before the case was decided. During World War II, nearly 1 million black Americans had served in the U.S. armed forces, mostly in segregated units. Many had served with honor. Benjamin O. Davis had become the first black brigadier general in the U.S. Army. Desegregation of the armed forces had begun on a trial basis, and it became permanent in 1948. Just prior to that, in 1947, Jackie Robinson of the Brooklyn Dodgers had become the first black major league baseball player, helping to break down racial barriers in sports.

Dwight D. Eisenhower was president. Harry S Truman had just stepped down after having been elected in 1948, to the astonishment of everybody but the people who had voted for him. That's an interesting story because Harry Truman was reelected, in great part, because of the black vote. President Truman was from Missouri, where I lived. Some very significant things happened in 1948 that reflected President Truman's sensitivity to the issues involving *Brown*.

Even though discrimination prevented many blacks from getting work back in those days, interestingly enough, the major problem that many African Americans faced was housing, not unemployment.

By the early forties, during World War II, African Americans had begun to

d of Education

ic School Desegregation

improve themselves economically and educationally. More and more were registering to vote, and about a million Southern African Americans had moved to the North seeking defense-related jobs in industrial cities. In major urban areas where there were substantial numbers of black people, however, property was covered by restrictive covenants, which were individual property owner agreements that the owner would not sell, rent, or lease the property to people on lists that included African Americans, Jews, and other racial and ethnic minorities. These covenants were written and recorded, and they ran with the land. Anybody who bought the property after the covenant had been recorded was subject to the agreement.

African Americans were hard pressed for decent places to live, and there was a strong effort by the NAACP to break these covenants. Since 1927, the Supreme Court's position had been that it would not deal with private agreements between individuals.

The effect was a very, very unhappy situation all around the country, particularly in the black communities in Detroit, St. Louis, Washington, D.C., and other places where these covenants were really hemming people in. Those of us who were trying to get our people decent housing were very frustrated, and that's where this whole thing began to boil. As the NAACP tried to figure out what to do, it continued to file suits. In some cases it won, and in others it lost. Finally, in 1946, a suit was filed in St. Louis against the J. D. Shelleys, a black family who had bought their home without being aware of the restrictive covenant on the property. The Shelleys won their suit before a lower court, and everybody thought that was the end of it. But the people who had sued them appealed to the Missouri Supreme Court,

Sign of the times in Macon, Georgia, 1950s (top); *New Brooklyn Dodger Jackie Robinson, 1947* (bottom).

Harry S Truman with Sen. Tom Hennings, 1950 (top); *"Separate-but-equal" facilities* (middle, bottom).

which overruled the lower court and ordered the Shelleys to move. That's when local people raised their voices, including James T. Bush, Sr., my father, who was the real estate broker instrumental in getting the Shelleys their house. They decided to organize and take the case to the Supreme Court.

But, before that case was over, something unprecedented happened. For the first time in anyone's memory, the U.S. government entered as a friend of the court, on the side of the Shelleys: the first civil rights case involving private citizens, I think, where the government had ever done so. There's a very interesting story about why the government did this, and I have my own theory. Missouri had a dynamic senator named Tom Hennings. He and the president were very close. Hennings was also very close to some leaders in the black community in those years, who I am sure briefed him on this case and urged him to persuade the president to support it. I think this combination of factors ended up with the solicitor general's filing the court amicus brief on behalf of the government, in support of outlawing racially restrictive covenants.

Once the case had been heard, we knew that a decision was coming. But we had no idea what it was going to be. The problem was that only six, not nine, Justices had appeared to hear the case. The other three had recused and excused themselves. That meant that the NAACP needed five of the remaining six votes, or we lost. It was high drama. The lawyers scrambled to get profiles on the six remaining Justices to see how to craft their arguments. The fact that those three Justices had stepped aside just blew us away. There was no way of knowing how many votes we could get out of the Court—no way of getting any reading. And there wasn't any television—no news coverage of the type we're accustomed to now. All we had was the radio and decades of discrimination to ponder. In 1948, when the Supreme Court finally held that these restrictive covenants could not be enforced in the courts, we were elated. But first we had to overcome our complete surprise.

That was the civil rights climate as we moved uphill into the fifties. The housing problem was not solved, but it was relieved.

Now, what was the larger climate? World War II was over, and the Marshall Plan was starting. The Truman Doctrine and North Atlantic Treaty Organization were initiated. The white South African government came into power around that time; and, in the rest of Africa, there was a bubbling up of people seeking to be liberated from colonialism. That's the background against which we look at *Brown v. Board of Education*.

While the Shelley case did something about housing, *Plessy v. Ferguson* was still on the books. This infamous 1896 case, where the Supreme Court ruled it constitutional to have "separate-but-equal" facilities for whites and blacks, was still on the books. As long as that decision was part of the law of the land, every black person who had any sense of personal dignity would feel offend-

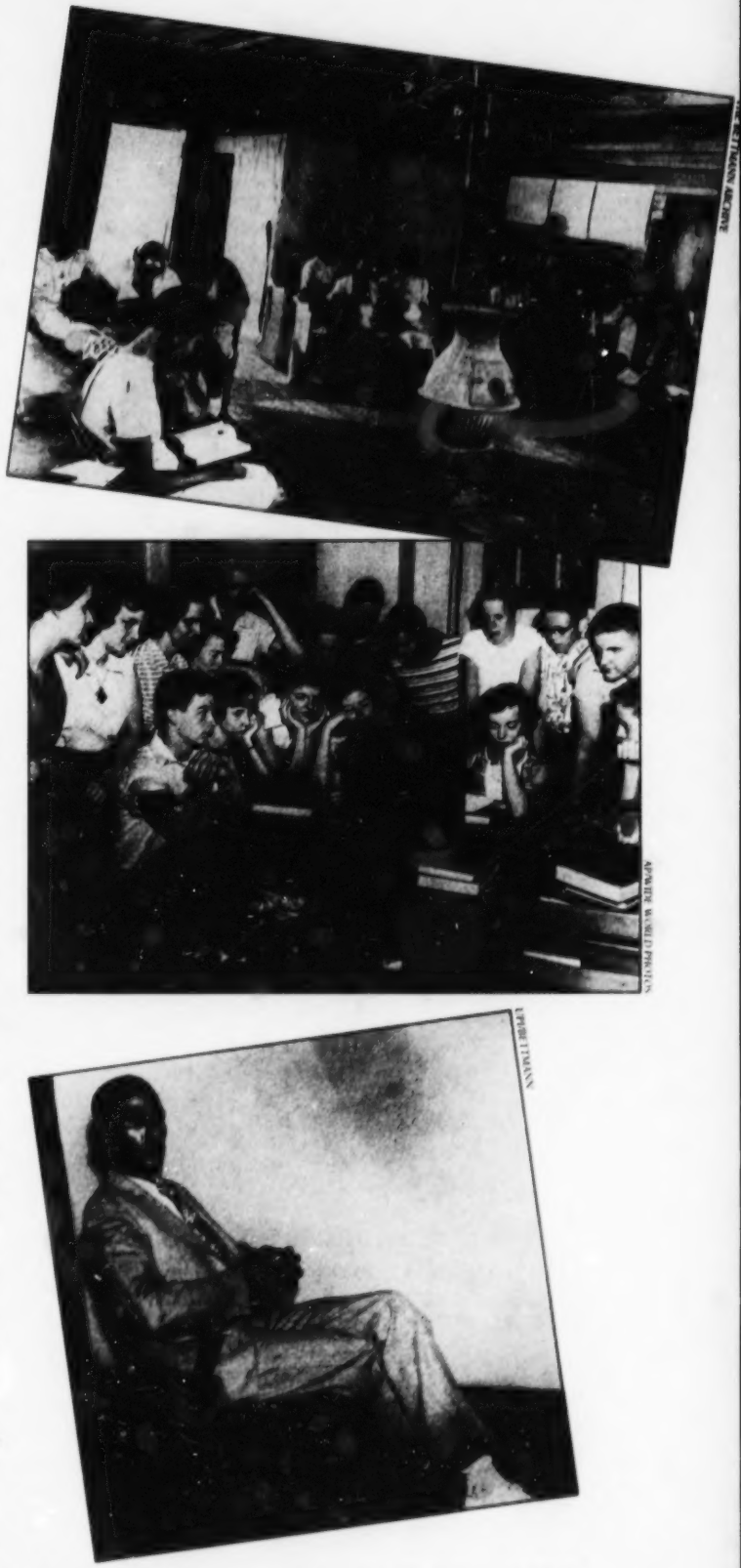
ed. I can remember, when I first understood what the decision meant, intellectually I could not believe it. It was appalling. How could this be when it contradicted the Constitution? It's very interesting how, despite the Civil War, and despite the Thirteenth, Fourteenth, and Fifteenth Amendments that followed, a majority of the Justices listened to the climate of their times and maintained it—even though the war and at least those amendments had set a framework for a different kind of way of life. There was still a lot of genuine hostility between the South and the North, and the South felt put upon. We African Americans were pawns.

Starting with Mr. Justice Harlan, who dissented in the *Plessy* case, people need to know that there are a lot of unsung heroes and heroines in the struggle to end racial segregation sanctioned by law and to desegregate the schools. When people hear the name *Thurgood Marshall*, they think of this stunning man who stood up to the Supreme Court and took on the best lawyers that the South could bring forward—and won. He was a hero, but behind Thurgood Marshall was the institution, and behind that institution was a cadre of ordinary people all over the country. Of course, I'm talking about the NAACP and its membership base.

The NAACP started out trying to desegregate schools by challenging segregation in Midwestern professional schools—especially law schools, such as those in Missouri and Oklahoma. The strategy was to start there because the nine Supreme Court Justices were all lawyers, and they should have been able to understand the contradiction of having a Constitution, a Bill of Rights, and the Thirteenth, Fourteenth, and Fifteenth Amendments coexisting with policies based on race, that barred state taxpayers from being educated in state-supported schools that were teaching about the law.

The NAACP's efforts to desegregate the schools had really started in the midthirties with the Lloyd Gaines case in Missouri, my home state. It went all the way to the Supreme Court. When Gaines finished Lincoln University in Jefferson City, he decided that he wanted to go to law school and applied to the University of Missouri. The university refused to admit him but agreed to pay his tuition so that he could go to any other institution he wished. Many black Missourians had done just that. Some had gone to Howard University in Washington, D.C., and some to the University of Michigan, for example—and they received a fine education paid by the state. An African American, then, could not be educated in Missouri but could come back to take the bar and practice there. What was the state gaining? There was nothing logical about this. It was simply a case of not letting black people in.

Lloyd Gaines did not want the state to pay his out-of-state tuition. He wanted to go to the law school in Missouri, and the state said no. In Missouri's entire history, only one black student had ever graduated from one of its law schools—that was from Washington University, a



Educational facilities for blacks and whites, 1940s (top, middle); *Lloyd Gaines, 1936* (bottom).

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Lincoln University's new dormitory, 1939 (top); *court-ordered "integration" at University of Oklahoma, 1948* (middle); *Linda Brown, 1952* (bottom).

private school in St. Louis. By the 1930s, however, that institution was closed to blacks as well, and there were no other professional schools open in Missouri or in Kentucky, Maryland, any of the other border states, or in any of the southern states.

In 1938, the Supreme Court ordered Missouri to admit Gaines or to provide a separate-but-equal educational facility for him. Well, there was no way the University of Missouri could have created a law school out of whole cloth by September of the coming school year, so everyone thought Gaines was going to go to the University of Missouri Law School. But something very strange happened. Lloyd Gaines disappeared, physically and literally. To this day, nobody knows where. No one ever filed a complaint about his disappearance. Even his family never raised a question. It was just a mystery. Of course, there are those who think that somebody got to him and just made it convenient for him to vanish.

What Gaines's disappearance did was to give the University of Missouri and the state legislature a whole year to create a law school for blacks in St. Louis—with a library, faculty, accreditation, the whole bit—and connect it with Lincoln University. It was called the Lincoln University School of Law. That's where I went to law school.

Other states didn't proactively establish law schools for African Americans in response to the Gaines decision. They had to be pushed even to do that, by suits the NAACP won. In most cases, the states complied. Soon Oklahoma, Texas, and Louisiana had opened law schools for blacks—all were state-tax-supported institutions with their own faculties, almost always composed of black instructors. Segregation was being maintained at a very high cost, and these states remained willing to pay.

The NAACP's next strategy was to look at black teachers' salaries compared to those of white teachers. This was a national scandal because there wasn't a single state where the pay was equal or even close. The basis of this discrimination was nothing but race, and there was no defense to the teacher equalization suits that the NAACP filed. But no one had yet frontally attacked the central issue that the separate-but-equal doctrine itself was wrong. That wouldn't happen until *Brown*.

By the late forties, the Supreme Court had ordered some segregated universities and colleges to admit African Americans, but it was an accepted practice to make these students sit separately from the white students, sometimes in a different room. Then, in 1951, a black railroad worker named Oliver Brown sued the board of education of Topeka, Kansas, for not allowing his daughter Linda to attend the all-white Sumner Elementary School near her home. As a basis for demonstrating that the separate-but-equal doctrine was unfair and discriminatory, the NAACP's lawyers decided to go outside traditional approaches in preparing their court briefs and instead to talk about the sociological impact segregation had on citizens. Charles Houston, once the

NAACP counsel, was the brains behind developing the brief for *Brown*, but Thurgood Marshall—his dazzling pupil—presented the legal argument and stood in the limelight. Marshall, of course, was later to become the first African American Supreme Court Justice.

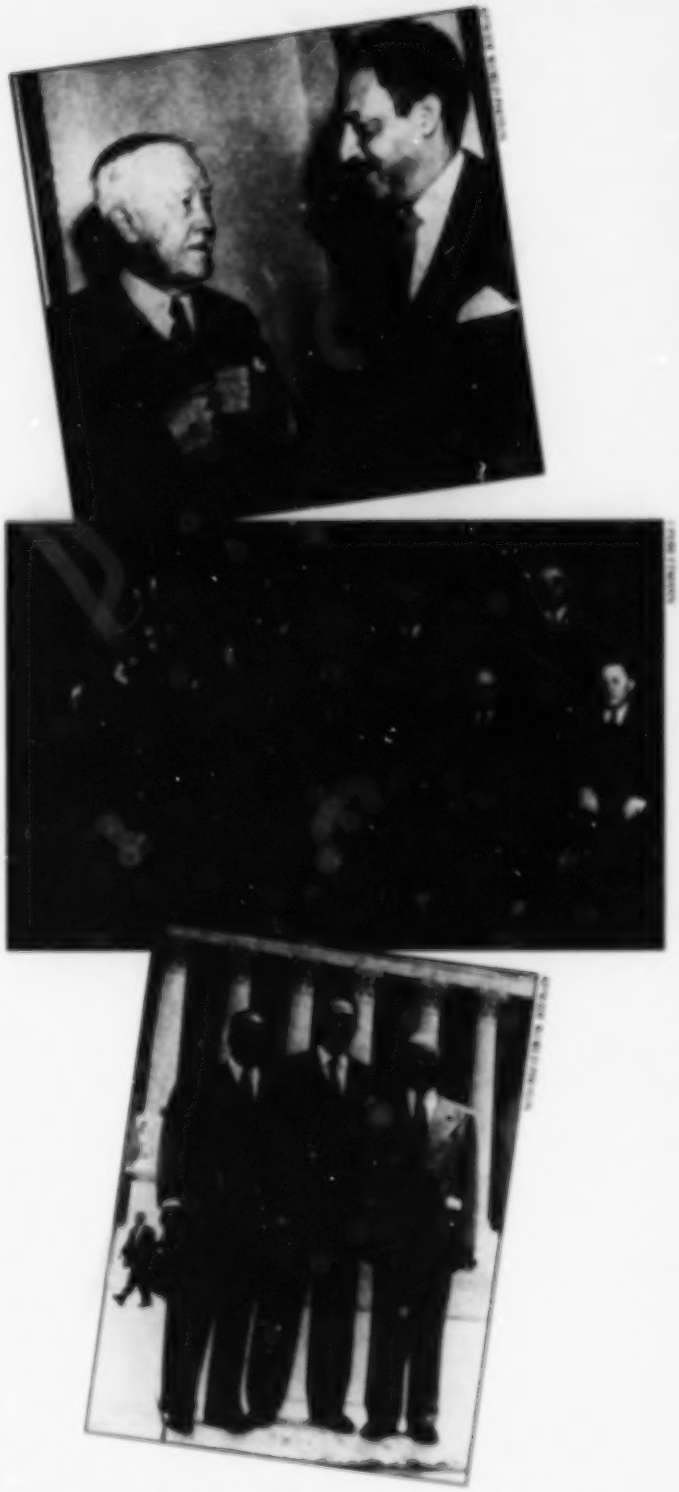
When *Brown* was decided on May 17, 1954, my son was four years old. I had been practicing in St. Louis with my husband since about 1947. Six years had passed since *Shelley*, and I remembered the excitement of all that. But it was nothing compared to the ecstasy we felt when the *Brown* decision came down.

I can remember that beautiful day in May. I was home for some reason, listening to the radio, when I heard it. The Supreme Court had ruled that racial segregation in schools was a violation of the Fourteenth Amendment and that segregated schools were "inherently unequal," depriving minorities of equal educational opportunities. Linda Brown was to enroll in Sumner.

What was the first thing my family did? We dashed to the phone and called everybody. We had more fun on the phone. And we sat around glued to the radio. Everybody came over—relatives, neighbors, everybody. We went running up and down. And the celebration just continued. When you've grown up under a system that is so ugly, and then have it transformed by a single court opinion, in a single day, it's breathtaking.

We were ecstatic and stunned about the unanimous 9-0 decision. As I look back and think about it, the only thing that bothered me was that the Supreme Court rendered the decision but delayed the remedy. I had never heard of that in the practice of law. As an attorney, I was completely flabbergasted. The phrase that I remember is "with all deliberate speed." The schools would be desegregated with all deliberate speed once the Court finally worked out the remedy. I had never heard that phrase used in any decision; I'd never heard it anywhere before. You know, it didn't take all day to segregate us; they just wrote a fiat. I wonder now, if the Court had not delayed and instead had ordered all the schools to open forthwith, would the South have gone into complete revolt? Would there have been chaos? I don't know. But, once the remedy was delayed, it took years for the South to accept desegregation, and some states used all kinds of tactics to get around it.

In St. Louis, I think an immediate remedy might have worked. The African Americans there lived in the center of the city—in the middle between the whites, who lived on either side to the north and south. We had recently built brand new schools all up and down this central corridor, presumably to keep the black children from going anywhere else. But it would have been a simple matter to integrate all those schools very quickly. Instead, we didn't start until 1955 and then did so in stages. I know because my son went to one of the first integrated schools. They integrated the kindergarten first, and then the other grades one by one. But, instead of using the schools sitting in the center of the city, they did all kinds of strange



Opposing counsel in Brown, *1952 (left, John W. Davis, right, Thurgood Marshall)* (top); *U.S. Supreme Court, 1954 (front row, left to right: Frankfurter, Black, Warren, Reed, Douglas, back row: Clark, Jackson, Burton, Minton)* (middle); *Victorious* Brown *attorneys outside Supreme Court, May 17, 1954 (left to right: George E. C. Hayes, Thurgood Marshall, James M. Nabrit)* (bottom).

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A cadre of ordinary, concerned people wait to hear Brown *at Supreme Court, 1953* (top); *After the decision, they waited for the remedy* (bottom).

things to keep most of them all black. So, we had integrated schools on the edges, but not full integration.

Even today, there are substantial numbers of schools that are predominantly white or black. This may be because of neighborhood patterns or shifting populations; yet, I think there is an enormous value when young people get to know young people who are different from them. When I look back on my own schooling, which was entirely segregated, I can say that I received a marvelous education. My teachers were African Americans who went to universities and had fine degrees but couldn't get jobs in the larger communities. So they came back with Ph.D.'s to teach high school. My education was so insulated, I didn't really know how I stacked up against others intellectually or academically until after I finished law school and took a federal civil service exam for lawyers. Not only did I pass, but I ended up in the top three. The agency invited me for an interview and I was hired. And that was before affirmative action.

On the other hand, I can see a place for today's efforts by African Americans and other minorities to establish their own vehicle for preserving and teaching their culture and heritage. If educational institutions had, as a matter of course, included other than European heritage, culture, and contributions in mainstream education, there would be no need for these demands. I'm heartsick that we're going into the twenty-first century with so many racial problems unresolved.

This country has a potential for incredible greatness. A lot of my life and time has been given to opening doors and getting the momentum going for change. One of the things that I think it is essential to understand is that all of us in this country are two persons: a private person and a public person. This isn't being taught to our children early enough. If somebody had told me in the sixties that we would have the problems we have today with drugs and guns, I would not have believed it.

Most of us function primarily as private persons. When we do function publicly, we have to be concerned not just about voting but about maintaining the community and the commonweal—not just once in a while, but all the time. I know that I'm two persons, and I'm constantly finding myself reacting as a public person by doing something that I really don't have to do; but I know that if I do it, things will be better for a whole lot of people.

The one thing I would ask of teachers and parents is to instill this precept in our youngsters at an early age so that they will begin to look beyond their personal needs and do something for somebody besides themselves. A lot of our problems would come into proper focus if people stopped functioning as if they had no responsibility to anybody but themselves—if we had an expanded cadre of ordinary people committed to maintaining the commonweal. Can you imagine how exciting it would be in this country today if we had a critical mass of people standing up against drugs and violence as people did against racial segregation 40 years ago! □

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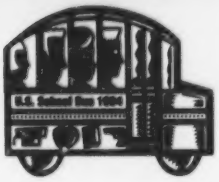

Sexual Harassment in Schools

Ralph D. Mawdsley

I. Perspectives on the Law

A look at important legal principles and precedents that have framed sexual harassment law

In *Education Week* (February 1993), a California state senator described sexual harassment as "a dirty little secret that's been around for a long time . . . something we've kind of accepted." Sexual harassment began receiving judicial attention as a serious societal issue in the 1980s, but it didn't seem to become a matter of major public interest until the media aired Anita Hill's sexual harassment charges against Justice Clarence Thomas during his confirmation hearings in 1991. Today, the emerging body of sexual harassment law clearly indicates that employees will no longer tolerate sexual misconduct at work—and neither will students, whether on school premises or at school activities.

Students, like workers, are entitled to personal dignity. Courts have been consistently supportive of school district efforts to dismiss employees found to have engaged in sexual misconduct, even when it involved no more than writing love letters to students. Part of engendering respect for individuals is identifying, addressing, and removing all forms of sexual misconduct.

The law has armed students with various causes of action in torts, as well as an arsenal of statutory remedies, some of which are described below. Among other penalties, it is hoped that the threat of liability for financial damages will force school officials to address this major societal problem in the school context.

Early Harassment Cases

The first court cases dealing with sexual harassment involved employment settings where women alleged that employers had engaged in physical and nonphysical acts of sexual misconduct. Once courts determined that employers could be liable for money damages when supervisors sexually harassed employees, workers began to litigate whether employers could be liable when they failed to act in a reasonable manner to stop employee acts of sexual misconduct toward fellow employees.

A similar pattern has begun to develop in school cases. School administrators, teachers, and staff have been found liable for acts of sexual harassment that they themselves committed against students; but students also have begun to litigate the issue of whether school administrators and school boards should likewise be liable for their employee's sexual misconduct on the grounds that the school district negligently hired and retained sexually abusive staff members or inadequately supervised them. And liability in the schools has now gone beyond these issues to whether school officials should be liable for sexual harassment by students against students.

Quid Pro Quo & "Hostile Environment"

When Title VII was interpreted, the EEOC regulations became important because they raised two distinct grounds for alleging sexual harassment: *quid pro quo* (sexual demands made in exchange for an employment benefit) and what has become known as "hostile environment." In the seminal case of *Meritor Savings Bank FSB v. Vinson*, 477 U.S. 57 (1986), the Supreme Court determined that both were grounds for sexual harassment. In *Meritor*, a female bank employee who was fired brought suit against the bank under Title VII for sexual harassment based on her supervisor's demands for sex, to which she had acquiesced for fear of losing her job.

The employee's complaint alleged not only that her employment was conditioned on sexual participation, but that the supervisor's behavior created a hostile work environment. A unanimous Supreme Court agreed with the employee that "[w]ithout question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminates' on the basis of sex." The Court further observed that "a claim of 'hostile environment' sex discrimination is actionable under Title VII."

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Statutes and Regulations

Most of the recent legal development in the remediation of sexual harassment has resulted from judicial interpretation of two older federal statutes: Title VII of the Civil Rights Act of 1964 [42 U.S.C. § 2000e-2], which deals with virtually all employees in public and private employment, and Title IX of the Education Amendments of 1972 [20 U.S.C. § 1681(a)], which deals with both employees and students in educational settings. Quoting the language of these statutes is important because, in determining remedies for sexual harassment, courts must operate within the limitations of statutory expression and legislative intent.

Title VII

Title VII provides that it is unlawful for an employer:

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; or

(2) to limit, segregate or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

The Equal Employment Opportunity Commission (EEOC), which has the responsibility of enforcing Title VII, identified three categories of sexually harassing conduct:

> Unwelcome sexual advances, requests for sexual favors, and other verbal and physical conduct of a sexual nature constitute sexual harassment when:
>
> (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment,
>
> (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or
>
> (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

Title IX

Title IX bars discrimination in educational programs receiving federal funds administered by the U.S. Department of Education:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.

The Office of Civil Rights of the United States Department of Education (OCR), which has the responsibility of enacting interpretive regulations and enforcing Title IX, has defined sexual harassment as:

> Verbal or physical conduct of a sexual nature, imposed on the basis of sex, by an employee or agent of a recipient that denies, limits, provides different, or conditions the provision of aid, benefits, services or treatment protected under Title IX.

Subsequent to *Meritor*, state and federal courts found that conduct such as fondling or touching, verbal abuse, display of pornography in the work place, or perpetuation of sexual stereotypes constituted sexual harassment, even though such conduct may not have been overtly sexual. This opened the door for employees to sue employers for conduct that was sexually offensive even when no employment benefits were involved. In *Comeau v. Board of Education of the Ballston Spa Central School District*, 160 A.D.2d 1150 (1990), a school district's female transportation employees had hostile work environment claims against the district when a male supervisor frequently used vulgar language, told sexual jokes around the garage, regularly patted or attempted to pat the women on their buttocks, and, on more than one occasion, touched their breasts.

Courts have tended to find that, while a single act may be sufficient to support a *quid pro quo* claim, it may be insufficient to prove a hostile environment claim. A determination as to whether conduct creates a hostile environment depends on whether the conduct was unwelcome, severe, or pervasive and whether the complainant, based on personal conduct, dress, and language, could reasonably have been offended by the alleged harassing conduct. In *Harris v. Forklift Systems, Inc.*, 114 S.Ct. 367 (1993), a unanimous Supreme Court recently clarified the applicable standard regarding what constitutes a hostile work environment, making it easier for plaintiffs to succeed in sexual harassment claims. The Court found that suffering serious psychological harm or injury was not necessary to support these claims. Rather, all that is needed is that the employee perceives the environment as hostile or abusive, and that a reasonable person would agree.

Responses to Student Claims

Unfortunately, school districts have not always been responsive to student complaints alleging sexual harassment. Some cases suggest that school districts at times may have been more concerned about the reputation of a teacher charged with harassment than

with conducting an investigation of a student complaint.

In *Stoneking v. Bradford Area School District*, 856 F.2d 594 (3d. Cir. 1988), a high school band member alleged that the band director, who had won numerous band competitions and enjoyed strong school district and other support, had coerced her through threats of reprisal and intimidation to engage in various sexual acts before and after her graduation. When she complained to administrators, she was told that it would be her word against the band director's and that she should not tell her parents. When she did, her father met with the administrators, who attempted to persuade him to drop the matter because no teacher would have behaved as his daughter alleged. The administrators had also dissuaded another student from acting on the complainant's behalf by pointing out that, if she persisted with her complaint, "she wouldn't look good." On an earlier occasion, when another student had complained about the band director's sexual harassment, an administrator had required her to recant her allegation in front of the band.

Stoneking, which was finally resolved out of court after ten years of litigation, may or may not represent the kind of response students who complain about sexual harassment will receive from school officials. But information gathered by the Project on Sexual Harassment in Schools at Wellesley College's Center for Research on Women indicates that student-complainants, who are mostly females, frequently find their complaints are not addressed in a serious, sensitive, and responsive manner for reasons suggested in *Stoncking*.

School District Liability

Laws protecting against sexual harassment in the work place continue to have a salutary effect in educational settings. In *Franklin v. Gwinnett County Public Schools*, 112 S.Ct. 1028 (1992), a unanimous Supreme Court held that, when a teacher was alleged to have harassed a student by forcible kissing on the mouth, placing calls to the student's home requesting social meetings, and coerced sexual intercourse, money damages would be available to the student under Title IX for virtually all forms of this type of misconduct. More important, the student could recover against the school district and its supervisors because, although she had complained to school administrators, they took no action to put a stop to the harassment and discouraged the student from pressing charges.

Franklin's impact is significant. The Court has clearly determined not only that the term *sex* in Title IX refers to sexual harassment, but, by granting the student damages, it has also imposed on the school district a significant financial incentive for addressing the offense whenever it occurs in its schools.

Generally, any recovery from school officials or districts will be predicated on some degree of knowledge by the officials concerning the alleged sexual harassment. While the most certain way to have this knowledge is for the student to make a complaint to a teacher or administrator, the information might also be inferred from rumors circulating about the school that identify employees or students who have allegedly engaged in harassing conduct.

Some of the most painful harassment can come from a student's own peers. In February 1993, OCR reported in *Education Week* that, among the 40 sexual harassment cases it was investigating, two alleged peer harassment of elementary-age students on school buses. As with employees, student harassment can range from oral or written comments, taunts and jokes, bathroom graffiti, pinching, and grabbing to obvious physical assaults including rape or attempted rape.

Safe Environment Maintenance

Schools can be held responsible for maintaining an environment that is safe from sexual harassment. The same issue of *Education Week* reported that, in 1991, a Duluth, Minnesota, student was awarded a $15,000 settlement by the state human rights commission for "alleged mental anguish and suffering" because the school district had failed to remove sexually explicit graffiti about her in the boys' bathroom, despite repeated requests

New Development!

Principal Held Liable in Student Molestation

Students not only have a constitutional right not to be sexually molested by their teachers, but principals and superintendents can be held liable for the misconduct if they have shown "deliberate indifference," a federal appeals court has ruled.

In *Doe v. Taylor Independent School District*, Fifth U.S. Circuit Court of Appeals, New Orleans, 90-8431 (1994), a principal allegedly failed to warn or discipline a sports coach who had a sexual relationship with a 15-year-old student for several months. The coach, who finally resigned, was later convicted on criminal charges related to the girl's molestation.

The ruling that the principal could be sued for inaction was one of the first appellate decisions allowing such litigation against a school official. In handing down the verdict, the court said, "If the Constitution protects a schoolchild against being tied to a chair or against arbitrary paddlings, then surely the Constitution protects a schoolchild from physical sexual abuse."

Judge Will Garwood gave the dissenting opinion, calling the principal "indecisive, insensitive, inattentive, incompetent, stupid and weak-kneed," but stating that the school official had no constitutional duty to take more action. Five judges joined Judge Garwood in saying that sexual abuse didn't clearly occur because the student may have been mature enough to have consented freely.

to do so. In 1992, a student at Kenilworth Junior High School in northern California won an out-of-court settlement for $20,000 from the school district's insurance company because she had been unhappy with the way the school officials had handled her complaint about boys "mooing" at her and making comments about her breasts.

What these cases suggest is that sexual harassment is defined by the victim; if an individual finds the comments or physical activity to be unwelcome, then the behavior could be construed as harassment. School officials can no longer dismiss student harassment complaints with responses such as "kids will be kids."

In *D.R. v. Middle Bucks Area Vocational Technical School*, 972 F.2d 1364 (1992), two girls who had been repeatedly sexually molested in a unisex bathroom attached to a graphic arts classroom were unsuccessful in their lawsuit alleging that the school district had been deliberately indifferent in not providing adequate supervision to protect them from harm. In this case, the girls had claimed that school officials knew or should have known that the molestation was taking place, even though the students had not complained to school personnel. The court refused to find liability for the school district where no school employees had witnessed the conduct or were aware that it had taken place.

D.R. raises the difficult question of whether a school district, which can be liable for failing to address a complaint of sexual harassment once it has been made, should also be liable where more school personnel supervision may have prevented the sexual harassment from occurring.

The clear message of both *Stoneking* and *D. R.* is that school officials and boards may not be liable for sexual molestation of students by employees and other students in all situations, especially where there is no knowledge of the harassment. But, if a student does complain to school officials, they will not only have a duty to investigate but also to provide effective remedies for sexual misconduct that is found to have occurred. □

II. School Policy Development and Implementation

A policy outline to support lessons that give insight into preventive law, which all responsible organizations practice

Because students are in school, in part, because the state has mandated compulsory attendance, school districts should have some measure of affirmative responsibility to protect students when district officials know that the students' physical and mental safety are threatened. Four broad categories seem appropriate for prudent school districts to address in developing an effective policy for dealing with sexual harassment: ensuring the quality of the policy itself; educating students and school personnel about the policy; facilitating the proper report and investigation of sexual harassment charges; and formulating appropriate decision and remedies.

An Effective Policy

In the accompanying article on sexual harassment law, one apparent fact in *Franklin* (see "School District Liability") is that the school district had no formal policy or procedure for handling sexual harassment charges. In developing a school environment that is safe for students and employees, school districts should design and publish policies that include these features:

1. The policy should state that it applies to all persons in the school, including students, teachers, administrators, and staff, and that the policy will be interpreted in a manner that is consistent with the terms of state law and collective bargaining agreements.
2. The policy should identify kinds of conduct that will be considered unacceptable, including, but not limited to, physical contact, oral and written words with sexual connotations, and personal oral and written communications that are unrelated to the school's educational function.
3. The policy should limit physical contact between school personnel and students to situations where safety or health are factors.
4. The policy should encourage students to report all violations of the school's sexual harassment policy to teachers or other officials.
5. The policy should assure students that all reports of sexual harassment will be actively and diligently investigated and that appropriate action will be taken consistent with legal requirements.
6. Finally, the policy should identify the range of penalties that may be invoked for students, faculty, administrators, or staff found to have engaged in acts that violate the policy.

Education

Teachers need to be warned about the policy and its consequences. They must also be included in the process of handling student complaints and receive in-service training to perform this function properly. By the same token, they need to inform and sensitize students regarding sexual harassment.

If a school has other serious problems, such as those involving weapons or drugs, methods might be sought to assure that sexual harassment does not become de-emphasized by comparison to these other problems. Sexual harassment can have immediate and long-term emotional and psychological effects that may not surface until years later.

Publicizing the Policy

Simply creating a policy will not be effective if the school district does not take steps each year to publicize it to all students and school personnel. The district may want to consider several approaches: a schoolwide assembly, a series of assemblies, or a

student handbook distributed to each student at the beginning of the year are examples.

Training Teachers

School districts should conduct regular in-service training sessions for school personnel on school time. Besides clearly and unequivocally presenting the policy, these sessions should alert employees to school settings and situations where sexual harassment may occur and where constant supervision must be maintained. The sessions should further offer training in how to listen nonjudgmentally to student complaints; how to communicate them to the appropriate school official; and how to maintain confidentiality and avoid contributing to school rumors.

Investigation

The administrator's role in resolving conflict between students and school employees and between students and their peers is crucial. While adults in employment settings may be more likely in many situations to confront perpetrators and to file complaints, such assertive actions by students against teachers or by smaller/ younger students against larger/ older students may be less likely. School officials must make a sincere and reasonable effort to review each sexual harassment complaint.

Process

Although no specific steps for investigation are required, they should include:

- designating who will handle the complaint if no one is specified in the sexual harassment policy of the school
- contacting the complainant's parents as soon as possible
- acquiring the student's written accusation of sexual harassment
- acquiring the accused person's written response to the accusation
- orally interviewing each party as well as persons identified as witnesses for either party
- preparing a written report summarizing findings of fact
- if a violation has been found, including recommendations for penalties under the school's harassment policy

Privacy

School officials need to be circumspect in conducting the investigation, especially regarding the privacy rights of the parties involved. The investigation should be treated as a confidential matter involving no more persons than are reasonably necessary to ascertain the facts underlying the complaint. Harassment complaints will involve only a small group of persons; and, even though school officials cannot prevent rumors from circulating, they can take reasonable steps to keep from contributing to those rumors. An unbiased and fair investigation is an important consideration, both for the student and the employee. It is important to be aware that, just as a student (or employee) might have been sexually harassed, an employee could have been wrongfully charged. An employee who has been accused might be permitted to resign rather than go through the school's investigation process to determine whether sexual harassment has occurred.

Employee Rights

Accused employees must be provided with some form of hearing process that accords with school policy, collective bargaining agreements, state statutes, and constitutional law. At the very least, they have the right to present their side of the story, the right to introduce evidence and call witnesses, and the right to a fair and impartial hearing. Other rights that may be available are cross-examination of witnesses, the right to have counsel present, and the right to have a transcript of the hearing.

Decision and Remedies

Since a policy is no better than its enforcement, closure must be part of the complaint process. The interests of students, teachers, and administrators in addressing sexual harassment are not served unless a decision is reached on each student complaint.

School Liability: What Educators Should Know

Here is some important information that Charles Pagels, executive director of personnel for the Peoria, Illinois, Public Schools, recently gave principals during a convention session of the National Association of Secondary School Principals.

- ✔ A lack of sexual harassment complaints is a poor indication that sexual harassment is not occurring in your school.
- ✔ In sexual harassment situations, the law focuses on the impact the behavior had on the victim, not the intent of the harasser.
- ✔ If a complaint is filed, principals should be ready with copies of the district or school policy, training materials, and documentation about the facts of the incident and the steps the principal took in a follow-up investigation.
- ✔ Even when a victim requests no disciplinary action, principals should act because they may be held liable if another incident with a different victim occurs.

For more details from Pagel's speech, see Mary Massey, "Sexual Harassment: What the Principal Should Know," *NASSP NewsLeader* 41, no. 7 (March 1994): 5.

First Amendment Considerations

Certain school property remedies will obviously need to be invoked regardless of a complaint's outcome. For example, graffiti of a personally identifiable and sexually harassing nature must be removed promptly from school property. On the other hand, allegedly offensive items of a general and nonpersonal nature, such as cartoons posted on a bulletin board or comments published in the school newspaper, may invoke a First Amendment issue of free expression. Free expression issues concern not only the nature of the item alleged to be sexually harassing, but also the rights of the person who has displayed it. For example, questions may arise such as whether it makes a difference that the item is a posted local newspaper cartoon as opposed to a clearly visible and readable comment on a button worn by a school employee or student. What if the cartoon was drawn by another student and appeared in a newspaper published by the school's journalism class? Or what if an offensive item occurred in materials a teacher chose for instructional use?

Remedies

As a form of assuming the responsibility to protect students from sexual misconduct, the school district must decide what remedy to seek when it has determined that sexual harassment has occurred. Remedy options include asking an employee to resign or seeking some form of disciplinary sanction. A school district's refusal to pursue a remedy because an offending employee or student has already experienced embarrassment and/or peer opprobrium may be seen as a failure to enforce the sexual harassment policy.

Those persons responsible for enforcing the school's sexual harassment policy must respond to basic questions like these in order to select which form of discipline or sanction to pursue against the offending person:

- Should verbal sexual harassment be penalized less severely than physical contact?
- Should teacher misconduct be treated more severely than the misconduct of a student?
- Should varying penalties be imposed based on level of responsibility, such as treating an administrator who did not react promptly to a student complaint as severely as the offending staff member?
- Should employees who have committed sexual harassment be permitted to resign rather than have some form of disciplinary sanction imposed against them?
- Does venue make a difference: should classroom misconduct be treated differently than hallway or school bus misconduct?
- Should age and grade level influence the penalty?

School authorities must finally determine who has authority to enforce the penalty. In most student misconduct cases, this will be school administrators and school boards. When employees are involved, school officials may have to bring charges pursuant to procedures outlined in collective bargaining agreements or state tenure statutes. □

Review!

Under 18 Under the Law

(1993). Videotape. Length: 84 minutes, in two parts; $5.00 (make check payable to Kentucky State Treasurer). (Kentucky LRE, Attn.: Deborah Williamson, Project Director, Administrative Office of the Courts, 100 Millcreek Park, Frankfort, KY 40601). Reviewed by Paula Nessel, project coordinator of the ABA National Law-Related Education Resource Center in Chicago, Illinois.

Produced for television broadcast to Kentucky classrooms on two successive days, this program is intended to acquaint middle and high school students with issues raised in the juvenile justice system. At the time of the broadcast, Kentucky court-designated workers visited each participating class to serve as resource persons.

The program begins with a brief reenactment of the landmark 1960s juvenile court case of Gerald Gault, compares the sentence Gault received to the sentence an adult would have received for the same crime, and asks the audience to decide whether Gault was treated fairly. The program incorporates several pauses for the students to write about or discuss issues raised by the Gault case and a series of four fictitious juvenile cases that follow. The role of the court-designated worker, the meaning of *diversion*, and the criteria for referral to diversion are described. Among the points raised for audience participation is whether each case is appropriate for a court decision or for diversion. The audience is asked to write diversion contracts where suitable to the cases portrayed.

While some aspects of the cases are specific to Kentucky, and the presence of a court-designated worker as a resource person is assumed, this videotape can be adapted to other situations. The pauses promote student participation in not only analyzing the issues of justice for juveniles but also in feeling the responsibility of passing judgment on plaintiffs their age who have been referred to the court for shoplifting, truancy, harassing communication, and criminal mischief. The program assists the student in not only becoming familiar with the juvenile justice system but also in feeling a connection to it.

Teaching Strategy

Understanding and Dealing with School Sexual Harassment

Aggie Alvez

Background

The statistics are numbing: 4 out of 5 students in grades 8-11 say that they have been sexually harassed. Two in 3 students report being harassed in the hallway, while more than half say the harassment has taken place in the classroom. And nearly 1 in 4 students who have suffered harassment say that, as a result, they do not want to attend school.

These findings from a 1993 survey commissioned by the American Association of University Women, "Hostile Hallways: The AAUW Survey on Sexual Harassment in America's Schools," shocked an American public still struggling with the aftermath of the Clarence Thomas/Anita Hill episode. While most of the attention first focused on the behavior of adults in the work place, school administrators were beginning to confront an unsettling reality: students felt unsafe at school because of the pervasiveness of sexual harassment. School systems began to pay even closer attention after the U.S. Supreme Court ruled in 1992 that students who suffer sexual harassment can seek monetary damages from schools and school officials.

Increasingly, schools are implementing sexual harassment policies and guidelines for addressing complaints. Some, like the Montgomery County, Maryland, Public School System, are developing comprehensive measures to prevent sexual harassment. In Montgomery County, the school system has embarked on an ambitious plan to provide in-service training to all its 13,000-plus employees as well as a massive education campaign to reach all its students. Starting in elementary school, respect and appreciation for self and others will be emphasized as the foundation for appropriate social behavior. In addition, the superintendent has appointed a special Commission on Sexual Harassment in Education, comprised of community members, students, and staff, to review the school system's implementation of the policy.

Schools are recognizing that an essential component of any sexual harassment policy is **education for prevention**. The following lesson is an important beginning in helping teachers and students take a critical look at this important issue.

Aggie Alvez is the compliance officer for the Montgomery County Public Schools in Montgomery, Maryland, and formerly a program director with the National Institute for Citizen Education in the Law.

Objectives

As a result of this lesson, students will:

- define sexual harassment and cite the applicable laws for the work place and the school
- identify behaviors that may constitute sexual harassment
- describe the effects of sexual harassment on the victim, the harasser, and the school community
- cite procedures to follow if harassment occurs
- analyze scenarios and case studies to determine if sexual harassment took place and identify appropriate measures for preventing future harassment

Target Group: Secondary students

Time Needed: 5-7 class periods

Materials Needed: Student handouts 1-6

Procedures

1. Explain to the class that for the next couple of days you will be discussing sexual harassment. In order to give you an idea about their knowledge of the topic, distribute Student Handout 1, "What Do I Know About Sexual Harassment?" Ask students to complete the handout. Discuss the answers with them. Answers to Student Handout 1 appear at the end of these procedures.
2. Distribute and discuss Student Handout 2, "Sexual Harassment: The Law" and "Definition of Sexual Harassment."
3. Distribute Student Handout 3, "Is It Sexual Harassment?" Divide the class into groups of 3-5 students, and have each group assign a recorder/reporter to document and analyze the responses and report back to the class.
4. After discussing the answers to Student Handout 3, ask the groups to brainstorm a list of behaviors they think constitute flirting. Record their answers on the chalkboard/flip chart. Next, ask the groups to brainstorm a list of behaviors they think constitute sexual harassment. Record their answers on the chalkboard/flip chart. Possible answers to this exercise appear at the end of the lesson.
5. Ask the class to compare the answers on the lists. What are the major differences and similarities? What feelings are associated with flirting? with sexual harassment?

Can flirting turn into sexual harassment?

Note: Explain to students that flirting usually generates positive feelings for both parties, while sexual harassment invokes negative feelings in the party being harassed. Flirting involves some form of sexual attraction, while sexual harassment involves an abuse of power. The key question to ask in determining whether certain behavior constitutes sexual harassment is how does the alleged victim feel about the behavior? The law focuses on the behavior's *impact* on the victim, not on the harasser's *intent*. What may start out as flirting can cross the line if the person on the receiving end feels embarrassed, intimidated, or abused.

6. In light of this discussion, ask the students if any of them want to change the responses they gave in Student Handout 3. Next, ask the class to chart the scenarios from Handout 3 on a continuum from least offensive to most offensive types of behavior related to sexual harassment.
7. Divide the class into pairs, and ask each pair to generate a list of possible reasons why sexual harassment occurs. Record and discuss the responses. Possible answers appear below.
8. Assign each pair of students one of the factors cited in 7 above. Have them give specific examples and suggest some ways they might be countered.
9. Have the class as a whole generate a list of why victims are reluctant to report sexual harassment. Ask volunteers to organize this activity and prepare the final list. Possible responses appear at the end of the lesson.
10. Divide the class into groups of 3-5. Post the following categories on the chalkboard/flip chart: PHYSICAL EFFECTS, EMOTIONAL EFFECTS, SCHOOL PERFORMANCE. Ask the students to discuss ways that sexual harassment affects the victims in these three categories. Organize answers under their categories. Possible responses appear below.
11. Distribute and discuss Student Handout 4, "What to Do About Sexual Harassment." At this point, you and your class may want to review your school's sexual harassment policy and compare it to the handout. If your school has no policy, students can begin developing one to present to the administration.
12. Divide the class into small groups and distribute Student Handout 5, "Sexual Harassment Case Studies." Follow the directions on the student handout.

Answer Keys

Student Handout 1: **1. TRUE**—Title VII in work place and Title IX in schools; **2. FALSE**—76% of boys in grades 8-12 say they've experienced sexual harassment; about 15-30% of men say they've been harassed in the work place; **3. FALSE**—81%, or 4 in 5 students, say they've been harassed; **4. TRUE**—Only 7% of students tell a teacher, while less than 5% of incidents are reported in the work place; **5. FALSE**—79% of students are harassed by other students, while 25% of girls and 10% of boys have been harassed by a school employee; **6. TRUE**—schools and school officials can be sued for damages; **7. TRUE**—this can interfere with one's work performance or create a hostile environment; **8. FALSE**—Of the 59% of students who say they've been harassers, 94% say they themselves have been harassed; **9. FALSE**—Sexual harassment can occur if the conduct interferes with work performance or creates a hostile environment; **10. FALSE**—The law protects the victim and focuses on how the victim is impacted, not on the harasser's intent.

Exercise 4: cat calls, whistling, sexual comments about one's personal appearance, clothing, or the like, neck massage, kissing sounds, howling sounds, smacking lips, licking lips, deliberate touching, leaning over, cornering, pinching, personal questions of a sexual nature, staring, sexually suggestive drawings, photos, or other visuals

Exercise 7: stereotyping, media influence in perpetuating stereotypes, attitudes toward women, "boys-will-be-boys" attitude, social norms, sexist language, lack of clear communication, failure to report harassment; little or no dialogue about it, no policies or procedures, little or no training and education, no consequences or penalties for offender

Exercise 9: fear of harasser/retaliation, embarrassment, peer pressure, feeling of helplessness or powerlessness, feeling that the complaint won't be taken seriously, lack of trust in the school, guilt about getting the harasser into trouble

Exercise 10: *Physical effects:* stress-related symptoms such as headaches, stomach pains, loss of sleep, fatigue, nervousness, weight loss or gain, drug or alcohol abuse; *Emotional effects:* depression, anxiety, fear, anger, shame, guilt; *School performance:* inability to concentrate, reluctance to come to school, decrease in self-esteem and motivation

Suggested Follow-up Activities

Students can do a number of interdisciplinary activities that will allow them to take ownership of this issue and educate others in the school. To get the message out about sexual harassment, they can work with your school's language arts, art, drama, and communications departments, as well as the counselors, security unit, and media centers to:

- Develop an educational brochure
- Develop public service announcements (PSAs)
- Write, produce, and enact live or taped scenarios showing examples of sexual harassment and how to handle the incidents
- Create a bulletin board
- Sponsor Sexual Harassment Awareness Day/Week

Student Handout 1

What Do I Know About Sexual Harassment?

Directions: Circle *T* for true and *F* for false.

T F 1. Sexual harassment is a form of sex discrimination.

T F 2. Only females can suffer sexual harassment.

T F 3. Sexual harassment is primarily a problem of the work place, not the schools.

T F 4. Most victims of sexual harassment do not report it to a person in authority.

T F 5. Most of the sexual harassment that occurs in schools involves a teacher harassing a student.

T F 6. Schools can be held liable in cases involving sexual harassment between students.

T F 7. Posting nude pictures of men/women where they can easily be seen is a form of sexual harassment.

T F 8. Students who have been the victims of sexual harassment generally do not harass other students.

T F 9. Sexual harassment must involve some sort of *quid pro quo*—a benefit in exchange for sexual favors.

T F 10. If a person only intended to flirt, then the behavior cannot constitute sexual harassment.

Student Handout 2

I. Sexual Harassment: The Law

Sexual harassment is a form of sex discrimination under Title IX of the Educational Amendments of 1972 and under Title VII of the Civil Rights Act of 1964.

TITLE IX of the Educational Amendments of 1972 prohibits any person from being excluded from participating in, being denied the benefits of, or being subjected to discrimination on the basis of sex in any educational program receiving federal money. Title IX is enforced through the Office of Civil Rights (OCR) of the U.S. Department of Education, state departments of human rights, or private litigation

TITLE VII of the Civil Rights Act of 1964 protects public and private employees against discrimination with respect to compensation, terms, conditions, or privileges of employment based on race, color, religion, sex, or national origin. Title VII is enforced through the Equal Employment Opportunity Commission (EEOC) or state agencies.

The Civil Rights Act of 1991 allows victims of sexual harassment to recover compensatory and punitive damages from employers.

In ***Franklin v. Gwinnett County Public Schools*** (1992), the U.S. Supreme Court interprets the Civil Rights Act of 1991 so as to allow students who suffer sexual harassment and other forms of sex discrimination the right to seek monetary damages from schools and school officials.

II. Definition of Sexual Harassment

The federal Equal Employment Opportunity Commission defines sexual harassment as:

Any UNWELCOME sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature where:

1. Submission to such conduct is made, either explicitly or implicitly, a requirement of an individual's employment;
2. Submission to or rejection of such conduct by an individual is used as a basis for employment decisions affecting such individual; or,
3. Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive environment in which to work.

The two types of sexual harassment are:

Quid pro quo, or conditioning professional or economic benefits on the exchange of sexual favors (see procedures 1 and 2 above).
Hostile environment, where there is no need to show economic harm (see procedure 2 above). This is the most common type of school sexual harassment.

Remember: The focus should be on the victim and determining whether or not s/he viewed the conduct as being unwelcome.

Student Handout 3

Is It Sexual Harassment?

Directions: Read the following situations. Circle *Y* for yes if you think the behavior constitutes sexual harassment. Circle *N* for no if you think it does not.

Y N 1. A male teacher refers to female students as "sweetie" and "baby doll."
Y N 2. A male student comments to a female classmate, "Nice dress."
Y N 3. A female teacher demands a hug from every male student who is late to her class.
Y N 4. It is common for seventh-grade boys to snap girls' bras.
Y N 5. Third-grade girls chase their male classmates around the playground and try to pull down their pants.
Y N 6. Boyfriend and girlfriend give each other a "peck on the lips" when they part in the hall to go to their separate classes.
Y N 7. During class, a male teacher rubs the backs of several of his female students.
Y N 8. A first-grade teacher hugs one of his female students when she comes crying to him with a skinned knee.
Y N 9. A ninth-grade male regularly tells one of his female classmates that she is "flat as a board." He tells another that her "breasts are a 10."
Y N 10. Boyfriend and girlfriend kiss and fondle each other in the hallway during change of classes.

Student Handout 4

What to Do About Sexual Harassment

1. **TALK!** Tell the harasser how you feel about the conduct, and communicate that you want the behavior to stop. Be firm and direct. If you feel uncomfortable saying this to the harasser, put your feelings in writing.
2. **REPORT!** If the behavior continues or if the first incident is serious in nature, report the harasser to a teacher, counselor, administrator, or any other adult in authority.
3. **DOCUMENT!** Put your story in writing. Include the following information: Who the harasser is, what the harasser did, when the incident(s) occurred, where it occurred, who the witnesses were, what you did/said in response, how the harasser reacted, how you felt about the incident.
4. **QUESTION!** Does your school have a sexual harassment policy? Do you have a copy of it? Do you know and understand what it says? Are the administrators handling your complaint according to the policy? Do you know the actions taken by the administrator in your case? What will the administrator do to ensure that the incident won't be repeated?
5. **REACH OUT!** Enlist the support of your family and friends, and talk to your school counselor or trusted adult in order to share your feelings about the incident. Don't blame yourself. If you feel that the school is unable to resolve the matter, you may contact: the school human relations office, the superintendent of schools, the county or state human relations office, the state department of education, or the U.S. Department of Education's Office of Civil Rights.

Student Handout 5

Sexual Harassment Case Studies

For each case study, answer these questions:

a. Is it sexual harassment? Why?
b. What steps should be taken?
c. What steps can be taken to prevent this from happening in the future?

1. Second-grader Tonya rides the bus home from school. Two boys in her class ride the same bus and regularly yell obscene words at her, tease her about her sex organs, and call her sexually derogatory names. She has come home in tears several times as a result of their conduct.
2. Ms. Fleming, a high school biology teacher, has recurring neck pains due to injuries she received in an automobile accident. During class, she often asks male students to massage her neck and shoulders.
3. Mark and his girlfriend Maria take a cooking class together at their high school. On several occasions, their classmates have seen them kissing, fondling, and rubbing up against each other. No one has complained to the teacher.
4. Shelly, a 10th grader, teased one of her classmates about his weight problem. While poking Keith in the stomach, she said, "You'd do well to lose some of this." In response, Keith poked Shelly in the chest and said, "You'd do well to grow some of these."
5. Mr. Smith, a high school custodian, frequently stares at female students as he approaches them. His eyes scan their bodies from top to bottom; and, when they pass, he watches them from behind.

Violence in Schools—— Can We Make Them Safe Again?

An overview of the causes of school violence—and some directions to take in overcoming it

Carolyn Pereira

"School days, school days, good old golden rule days . . . " In 1940, the top school problems included talking out of turn, chewing gum, making noise, running in the halls, cutting into line, littering, and breaking the dress code. In a 1955-56 National Education Association poll, 95% of teachers described students as well-behaved.

By 1978, however, the National Institute of Education, in its report to Congress entitled "Violent Schools—Safe Schools," showed that school violence had become national in scope. By 1980, U.S. teachers identified drug abuse, alcohol abuse, pregnancy, suicide, rape, robbery, and assault as the top school problems. In 1992, the *Journal of the American Medical Association* revealed that the second leading cause of death for high-school-age children was being shot with a gun.

Not just people in large urban areas, but all of us have been inundated with statistics that cause concern about schoolchildren's safety. Illinois appears to be typical of the nation. According to a statewide survey conducted by the Illinois Criminal Justice Information Authority in May 1990:

- 1 in 4 students feared violence in school
- 1 in 5 students feared violence coming to and from school
- 1 in 12 students had been physically attacked

In a recent interview with *Catalyst* magazine, Lt. Thomas Byrne, the head of the Chicago Police Department's new school patrol division, indicates that, not only are there more incidents, but they are more violent: "The days of *West Side Story* and fist fights are over. Now it's chains and brass knuckles and anything you can maim with."

The violence we are seeing in school reflects the increased violence in society. Once, our children were able to grow in safe communities in much the same way as eggs develop in their protective shells. But, as columnist Ellen Goodman asked in one of her recent articles, have our communities become our Humpty Dumpty? How can we keep him from falling off the wall? And, if he has already fallen, how can we put him back together again? It will certainly take more than all the king's horses and all the king's men.

This article will examine what are believed to be the causes of violence in communities and schools, how school boards and legislatures are responding, and, most important, what our prospects seem to be for the future of our schools.

What Causes School Violence?

In a recent survey conducted by the National School Boards Association, school superintendents from urban, suburban, and rural districts ranked family problems and the violence on television and in movies ahead of drugs, alcohol, guns, poverty, and racial tensions as the first and second causes for school violence. *Family problems* means more than divorced or poor families. Traditional and well-to-do households are also disintegrating. Often, in environments imbued with violence, abuse, and addiction, there is a lack of parental caring and supervision.

Television often portrays aggression as an appropriate, expected, normal behavior for solving problems and relieving frustrations. Students can easily get the impression that they may, and should, replicate that behavior. As the study said, "In an era when some children spend as many hours with Beavis and Butthead as they do with Mom and Dad, efforts to limit the amount of violence on television seem especially appropriate."

Although drug use is declining, alcohol abuse continues to rise. Sixty percent of murders involve alcohol. Both substances affect judgment.

More and more guns are finding their way into the hands of young people, with deadly results. According to the Illinois Criminal Justice Authority, one out of three children brings a weapon to school. Recently, a six-year-old brought a gun to a Chicago elementary school and, by accident or design, shot one of his classmates. If current trends continue, by the turn

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of the century, the chance of dying by a gunshot wound will surpass that of auto accidents.

Social conditions exacerbate the situation. Poverty, as well as racism, can lead to feelings of powerlessness, alienation, and anger. Unemployment is on the rise, and minorities appear to suffer disproportionately. Anger can turn into violent action, not necessarily directed at anyone or anything related to the source of the problems. These random acts of violence add to rising tensions in school as well as in the rest of society.

How Are Schools and States Responding?

Though schools by themselves are unable to correct the social conditions that breed violence, they cannot ignore them. How are they and state legislatures trying to do their part?

The 1993 National School Board Association's survey on how schools were responding to violence included 600 school districts representing urban, suburban, and rural areas. This survey reported that, of the 600 school districts:

- 78% use suspension
- 72% use expulsion
- 15% have metal detectors to screen for weapons
- 50% search student lockers
- 24% send dogs to search for drugs
- 61% use conflict resolution and peer mediation programs
- 43% use mentoring
- 39% conduct multicultural sensitivity training
- 38% provide parental skill training
- 39% have law-related education programs

According to a survey reported in *Education Law Reporter* (1993), several states have passed statutes designed to keep weapons away from schools and school functions, often increasing the penalties as they did during their "war on drugs." The laws vary in how "tough" they appear. In Illinois, possessing a weapon within 1,000 feet of school property is illegal. If minors (ages 14-16) are indicted for this violation, they will be automatically transferred from juvenile to criminal court. In Louisiana, students who possess weapons can spend up to five years imprisoned at hard labor. Students in Texas who possess weapons are expelled. Although California law allows for student expulsion for carrying a weapon on school grounds, students with written parental permission may actually carry weapons to school; however, California also has a parental responsibility law. Colorado's Zero Tolerance Law provides for automatic suspension or expulsion of students possessing a weapon on school grounds.

Although most of the legislation has been designed based on a get-tough attitude, a 1993 Illinois law mandates violence prevention education in every school—if the funds are available. It was passed without an accompanying appropriation. Nationally, only 6% of funds directed at violence are spent on violence prevention programs. We must consider whether this really is an appropriate allocation of funds.

What About Our Basic Freedoms?

Some of these school practices and laws may set us on a path that erodes a number of the basic freedoms guaranteed under the U.S. Constitution. Although suspensions and expulsions carry with them some basic due-process assurances, in practice there is actually far less protection for a student accused of a suspendible offense than for one accused of a crime. Metal detector or dog searches of a student or locker challenge Fourth Amendment guarantees of freedom from unreasonable search and government seizure.

Obviously, exceptions have always been made in times of emergency, and courts seem to have sanctioned many of these actions, realizing, at least in part, that individual freedoms are not possible if the larger community has fallen apart. Nevertheless, "get-tough" policies might result in unforeseen and unintended outcomes that undermine a commitment to some of our basic democratic values. As we develop programs to prevent and treat, they must be compatible with a democratic society. Our democracy cannot survive unless people are committed to the rule of law and the underlying values of the Constitution such as justice, equality, liberty, and due process.

What Makes Children Violent?

The American Psychological Association (1993) suggests that the causes of school violence are complicated and interrelated. They involve children's nature and nurturance; that is, the habits they develop as a result of the intersection of their biological traits and their surroundings. Some children are more at risk because of factors that include:

- an aggressive nature (perhaps due to an overabundance of the hormone testosterone)
- race (African-American males have a 1 in 27 chance of dying by interpersonal violence)
- gender (females have a greater chance of being abused)
- sexual orientation (gays and lesbians become victims of hate crimes)
- disabilities (handicapped children are targeted because of perceived vulnerability)
- intelligence (some children are unable to generate nonviolent options)

Ronald G. Slaby, senior scientist with the Education Development Center and lecturer at Harvard University, emphasizes the thinking habits of those involved in violence, including their lack of skill in problem solving and their inability to generate alternative solutions. Often, these children, who are generally impulsive, not reflective, believe that violence is an appropriate response.

As already mentioned, a dysfunctional family environment adds fuel to the fire. Child-abuse victims are more likely to become abusers themselves. School and community incidents can also help to foster behavior that is inappropriately aggressive (or passive) in response to violence. Gangs can present terrible options to children—for example, join them or do nothing to oppose them. When biologically at-risk children are growing up in a vio-

Associations to Contact

Here are contacts for more information about youth violence prevention:

National Education Association
1201 16th Street, NW
Washington, DC 20036
Contact: Richard Verdugo
202/822-7453

National School Boards Association
1680 Duke Street
Alexandria, VA 22314
Contact: Lynne Glassman
703/838-6702

lent environment that condones violence and/or consists of victims of violence, they are more likely to become violent, condone violence, or otherwise encourage victimization.

Violent children and victims are often rejected by conforming peers, do less well in school, and hang out with similar types, reinforcing negative behavior. Not only do these early behavior patterns interfere with success in school and positive peer relationships, but they have lifelong effects.

What Protects Children from Violence?

Obviously, not all children who come from dysfunctional families or who attend violent schools become involved with violence. Bonnie Benard, a prevention specialist for the Western Center for Drug-Free Schools and Communities at Far West Laboratory for Educational Research and Development, describes characteristics that can protect a child from the environment. Unlikely to become involved with violence are socially competent children with problem-solving skills and a positive sense of self. Social competence includes concern for others, good interpersonal skills, and a sense of humor. Effective problem-solving skills include being able to understand rules and the reasons for them and evaluate a number of alternative solutions to frustrating situations. A positive sense of self includes confidence in one's ability to work out problems.

What Can Adults Do?

Families, communities, and schools can help children develop the characteristics outlined by Bonnie Benard and thereby alter children's potentially violent responses. Tim Buzzell (1992) has suggested that protecting children from aggressive behavior means providing them with:

- a sense of community—caring and support from a group of adults with whom the children can form significant bonds
- a structure of clear and consistent expectations about nonviolent behavior
- opportunities for children to take control of their lives, gradually gaining more and more autonomy

David Hawkins's social development strategy (1992) identifies bonding—the feeling of being connected to others who act prosocially—as most important in healthy behavior development. To overcome the effects of a dysfunctional family, a child might develop strong bonds with a nonviolent group if three conditions are met:

- the child is given opportunities to contribute to the group
- the child has the skills needed to contribute
- the child's contributions are consistently recognized

What Are Our Prospects for Safe Schools?

In light of these theories, it is important to consider how effective the courses of action reported by the National Association of School Boards might be. They can be categorized into deterrence, prevention, and treatment categories.

Deterrence

Five of the courses of action reported—suspension, expulsion, metal detectors, locker searches, and dog searches—attempt to treat the symptoms. They send a clear message to students that weapons and drugs are unacceptable at school. The punishments reinforce the message. This is consistent with Buzzell's theory that children need a structure of clear and consistent expectations about nonviolent behavior.

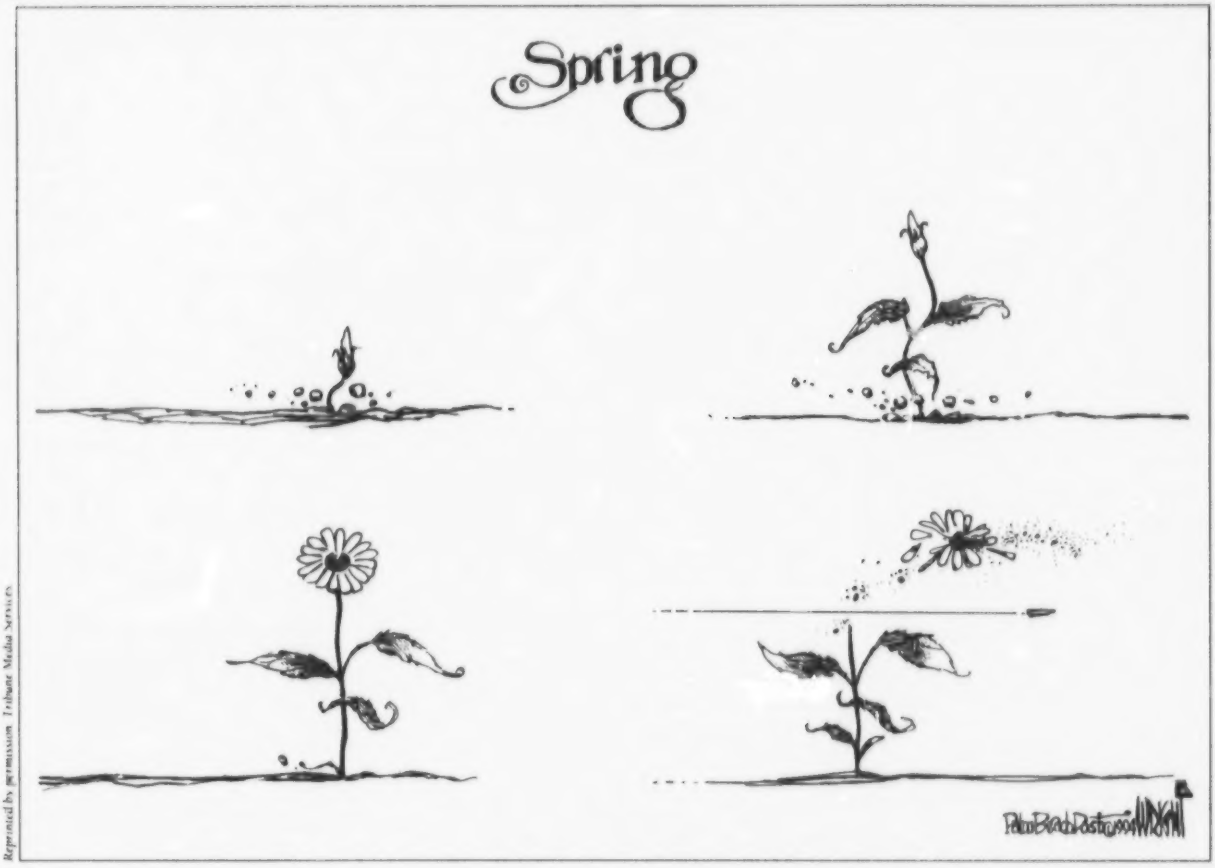
Deterrence is most effective with students who believe the rules are sensible, helpful, and equitably applied; who understand the need for rules; and who agree with the policies. But, according to Bonnie Benard's characteristics, these are the children least likely to be violent in the first place. Deterrence will be least effective and perhaps even counterproductive with the students most likely to bring weapons and drugs into schools, as they will neither agree with the policies nor submit to the rules as sensible or fair.

Establishing deterrence policies and rules will be much more powerful if schools meaningfully involve students in creating them. This process responds favorably to both the research and the democratic principles of involvement in rule making. The students will not only view the rules as more sensible than otherwise, but they will develop an understanding of the need to maintain a balance between Bill of Rights guarantees and the responsibilities citizens need to assume as they construct deterrence policies. As in the case of one Chicago high school student who advocated school metal detectors, they might be willing to abrogate their rights when they become involved in the rule-making process.

Prevention

The remaining measures might help eliminate school violence if they are used with all students *before* any violence occurs. Conflict resolution and peer mediation programs, which are designed to give students the skills to gradually take control of their lives, are the most commonly used method of this type. By giving students alternatives to violence and training them to resolve disputes before they turn violent, these programs appear to be positive responses to the research.

However, it is important to note



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that the cognitive development model, which emphasizes verbalization as in peer mediation, may be much more difficult for students prone to violence. Some educators are searching for ways that offer more physical outlets. It may be more helpful to be able to punch a bag or slam clay into a pot, at least to divert the violence to a nonhuman target.

Mentoring responds to the need for positive, significant relationships with positive role models. But mentoring may not have enough power to counterbalance the impersonal atmosphere of large schools with large classes.

The ability of multicultural sensitivity training to help students form positive bonds may be greatly strengthened by programs that link diverse students over the long term in ways that cause them to work together to problem-solve. Service learning is a powerful model for this purpose. Schools need to have options for students with different learning styles. Understanding why people act as they do, coupled with working together, certainly begins to address violence caused by prejudice.

Parental skill training is designed to tackle what everyone seems to agree is the major cause of violence—dysfunctional families—but, without the ongoing support of a positive community, it won't be effective. At least, learning about parenting can help students understand that there are different parenting models, not just the one they experienced.

When parental skill training also involves students' parents (the grandparents-to-be), they are often overwhelmed by their own problems—unemployment, poor housing, or failed relationships, for example. School systems do not have the resources to address environmental problems or firmly entrenched adult habits. Perhaps the most helpful aspects of these programs are similar to those provided to the students themselves—the parents are able to form a vision of another way of life and some behavior models that can help them reach that vision.

Law-related education has the potential for addressing both the bonding and cognitive development theories. LRE involves putting young people in contact with a variety of positive role models with whom to interact. It also helps develop critical thinking skills—generating and evaluating courses of action. When incorporated into the ongoing curriculum, it also reaches all students.

Treatment

All the "prevention" programs described, if offered only to students who are thought to be most likely violent or who have demonstrated violent behavior, can become treatment programs. Treatment programs have

several disadvantages. Many schools find that limited resources call for targeting programs for violence prevention at those most likely to be involved and those who already are. Bystanders to violence rarely are treated because they have not been seen as a critical piece in the puzzle; yet, even if students are not part of the solution to violence, they may be part of the problem. Excluding the majority of a student population from programs because they are neither perpetrators nor victims ignores the research that calls for a strong, positive, antiviolent community.

If not properly administered, targeting students as potential perpetrators or victims can have the additional disadvantage of contributing to self-fulfilling prophecies: if students are so labeled, they are more likely to earn their labels.

Is Further Research Available?

The research that informs schools about effective violence prevention programs is limited and inconclusive. Patrick Tolen and Nancy Guerra at the University of Illinois at Chicago are in the process of completing a review of the literature. Their paper, "What Works in Reducing Adolescent Violence: An Empirical Review of the Field," will be available this spring.

At the University of Michigan, psychologist Leonard Eron's research has identified children who are likely to develop patterns of violence. He has concluded that eight-year-olds who are considered highly aggressive are three times more likely to commit crimes by age 30. Some of the factors he used to identify overly aggressive children include those who disobey the teacher; who often say, "Give me that!"; who push and shove other children; who give dirty looks or stick out their tongues at other children; or who start fights over nothing. As part of his ongoing research, students who score in the top half on the aggression scale are offered three different kinds of treatments. The least expensive intervention is one year of classroom lessons conducted by the regular classroom teacher including all children, not just the aggressive. Another is 22 weeks of small group sessions taught by experts in peaceful conflict resolution. The most expensive treatment, family counseling, also lasts for 22 weeks. In order not to stigmatize the students, those who are selected are sent home with letters indicating they have been selected for "leadership training."

To wait, however, for the results of Eron's or any other research is not an option. What experts and common sense tell us is that no single response can stop school violence. Obviously, schools would be in better shape if society was in better shape; but schools may be the most practical hope of reversing society's violent trends.

The causes of violence are complicated and interrelated. The responses, therefore, must be diverse and varied—tailored to the actual setting in which the violence occurs and the nature of that violence. Every student is at risk. Schools must work now to enhance ways in which they provide students with a safe environment that allows opportunities to bond with nonviolent people as the students develop their cognitive skills.

We cannot afford to wait until society is better. □

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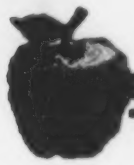


Teaching Strategy

No Weapons Allowed

Melissa Lumberg, Hilda Harris, and Charlotte Wager

Background

As in the war on drugs, state legislatures and schools often increase penalties as a response to rising violence. This simple strategy explores a new rule with a harsh penalty that a principal presumably posted after receiving a copy of a new state law designed to keep weapons out of schools.

Students will be asked to consider questions such as: Is the rule clear enough? Will this rule help solve the problem? Can/should it be rewritten? What else can/should principals, teachers, and other school officials do? What can police officers, parents, and students do to help make a school safer?

Objectives

- Students will compare and contrast the "letter" and "intent" of the law by using critical thinking skills in judging the hypotheticals in the student handout.
- Students will recognize that it takes more than a law to solve a problem and that they can play a role in solving problems.
- Students will develop an understanding that state legislators, principals, parents, teachers, police officers, and students may interpret rules differently.

Target Group: Secondary students

Melissa Lumberg, Hilda Harris, and Charlotte Wager are attorneys with the Jenner & Block law firm in Chicago. At James Ward School, they participate in one of the partnerships in the Constitutional Rights Foundation Chicago Constitution Program.

Time Needed: 1 day

Resource Person

The lesson provides a good opportunity to invite your school principal, assistant principal, or a local legislator to visit the class. The guest could react to the students' answers to the debriefing questions. An attorney is also a good resource person for this lesson. The attorney could discuss the process of evaluating a case from all points of view, as do the students who are part of the "human graph" described below.

Materials Needed

- Student handout
- This continuum on the chalkboard:

1	2	3	4	5
Strongly Agree	Tend to Agree	Undecided	Tend to Disagree	Strongly Disagree

Procedures

1. Have the class read the student handout.
2. Choose four or five students to become a human graph, and instruct them to stand in front of the chalkboard. Explain to the class that you will read each hypothetical in the handout and the members of the human graph will react to it by standing in front of the number on the graph that corresponds with their opinion.
3. Instruct the class that the members of the human graph are not allowed to speak, so that the class will have to interpret their thoughts for them.
4. Read each hypothetical. Ask the human graph members, "Do you agree or disagree that this is a violation of the law?" Allow time for human graph members to think about the hypothetical and physically move to a position on the line.
5. Now ask the rest of the class to explain why they feel students are standing under 1. Repeat with 2-5. As human graph members hear arguments that seem persuasive, they may change their minds and move about under the line at any time. You may choose to let the human graph members explain their position after all other students have commented.
6. Continue this process until all the hypotheticals have been evaluated and discussed.
7. To debrief, ask these questions:
   a. Does the school rule need to be changed? Why or why not? If so, how?
   b. Would the teachers, principal, students, parents, and surrounding community of Fairlaw School like your new rule? Why? Why not?
   c. Should consequences for breaking the rule be included? If so, what would be some appropriate consequences? (Possible answers include suspension, expulsion, and punishing the parents).
   d. What are some rules you think schools should have to make them safer?
   e. Who can help make schools safer?
   f. What can they do?
   g. What can you do?

Extension Activity

To improve the rule further, have students in groups of three or four attempt to revise it, including reconsidering punishments. Students may also wish to develop proposals for making schools safer and invite the resource person back to talk about their plans.

Violence Toward Youth, Not Youth Violence

Hon. David E. Ramirez, Judge of Denver Juvenile Court, asks readers to share this perspective on violence and youth. Judge Ramirez served on the American Bar Association Special Committee on Youth Education from 1990-93.

The recent concern over youth violence as expressed by local and national officials exemplifies the ignorance regarding children's issues generally. At the outset, I would note that the real issue is violence toward youth and not youth violence, although those terms are often used interchangeably. Youthful violence assumes youth are violent toward society in general. Violence toward youth implies that youth (children) are the subjects of violence by adults, and other youth. In that regard, it is the violence to youth that has created the current hysteria over youthful violence. Many studies suggest that children who are subjected to violence are more susceptible to becoming violent youth and later violent adults.

A recent survey by the National Institute of Justice indicated that being abused as a child increased the odds of future delinquency and adult criminality overall by 40 percent. The likelihood of arrest as a juvenile increased by 53 percent, as an adult by 38 percent, and as a perpetrator of violent crime by 38 percent if a child was abused and neglected.

It is within that context of violence toward youth that we must direct our energies if youthful violence is to be abated. Ongoing studies and data suggest that incarceration is not a preventative vehicle for future violence. In fact, one recent report indicates that jailing juveniles increased the potential for future criminal acts and jailing juveniles with adults exacerbates their criminality. This would suggest that prevention at age zero is the most appropriate point at which to address juvenile violence.

The irony of this situation is that answers are available and could have been adopted in the past. From scientific studies and common sense, we know why violence involving juveniles exists. The risk factors in the child's life create the cycle of violence. Those risk factors include: (1) family influences; (2) school experiences; (3) neighborhood and community influences; (4) peer influences; (5) individual characteristics.

. . . As a society of committed individuals, we need to deflect the focus from juvenile violence to the juveniles themselves. We need to shift the focus from incarceration to prevention, away from juvenile jails and toward juvenile care facilities. Our leaders must understand the origins of violence, not the results of violence. We must not mistakenly believe that victimization starts at the end of a gun, but when a child is born into deprivation and poverty.

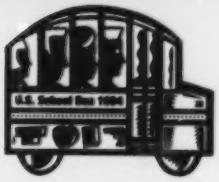
Source: Safeguard News & Views *(Spring 1994): 1-2.* Safeguard News & Views *is published by the Boulder, Colorado, Safeguard Law-Related Education Program.*

Student Handout

The state legislature wants to get tough on crime and help the schools become safer. Increasing school violence has caused it to pass a law saying that, if students bring weapons to school, their parents may be fined and the students may be expelled with possible automatic transfer of their case to adult court, where they could be sentenced to prison for up to two years. Also concerned about student safety, Fairlaw School Board has asked the principal to make sure students understand that they may not bring weapons to school. At all school entrances, the sign "No Weapons Allowed" has been posted. All students found with weapons will be reported to the police.

Try to figure out if the new law should apply in the following cases, keeping in mind both what the sign says, why the legislators passed the law, and what a weapon is.

1. Aaron, a fifth-grade student, takes the city bus to school every day. On the bus, he is sometimes bothered by a group of older boys who take his lunch money and threaten to beat him up if he tells. He is so scared that he begins bringing a short metal pipe to school in his book bag. He plans to pull the pipe out to scare the big boys if they start to hurt him. Is Aaron breaking the rule?
2. Keisha always carries a pocket knife that her dad gave her. She is artistic, and she uses the pocket knife to whittle small wooden statues while she is waiting for the bus going to and from school. Is Keisha breaking the rule?
3. Dejon brings a butter knife to school to use to spread tuna fish on crackers at lunch. Is Dejon breaking the rule?
4. Karen has to walk through a bad neighborhood to get to school. She carries a baseball bat with her every day. Is Karen breaking the rule?
5. Carlos's brother is in a gang. Carlos finds his brother's brass knuckles under the bed. He brings them to school to impress his friends and see if they know what they are. Is Carlos breaking the rule?
6. Jasmine brings a water gun to school and soaks all her friends at recess. Is Jasmine breaking the rule?
7. Andy saves rubber bands, which he likes to shoot at his friends. Is Andy breaking the rule?



Through Students' Eyes: A Fair Classroom

An analysis of students' views on common learning and testing practices

Theresa A. Thorkildsen

Suppose we set out to make issues of fairness central to testing and learning—to organize a classroom that simultaneously establishes equality and recognizes the characteristics that distinguish individual students from one another (e.g., skill, strength, wisdom, kindness, grace). How might we recognize the inherent tensions between the expectations of society and the agendas of particular students?

These are questions that we who are preoccupied with commutative justice ask ourselves. They are also commonly overlooked by educators who seek to establish fair schools. Educators do not ask why we have schools or if students who attend them should be asked to learn, take tests, and participate in contests. It is usually assumed that schools ought to exist and that such common classroom situations are ethical. Educators talk instead about how learning opportunities ought to be distributed, what procedures teachers should use to attain particular goals, and how to punish students who do not do what they are told. That is, educators discuss matters of distributive, procedural, and corrective justice while overlooking commutative justice.

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Moral Reasoning Assumptions

Psychologist Lawrence Kohlberg argued that most individuals overlook matters of commutative justice because they do not attain the level of moral reasoning that allows them to comprehend such questions. This position is developed in his text with Anne Colby, *The Measurement of Moral Judgment*, among other works. Yet, in the interviews on which Kohlberg's conclusions are based, individuals are never directly asked to respond to questions of how society ought to be organized. Instead, questions focus on personal conduct; for example, people are asked if a husband, Heinz, should steal a drug to save the life of his ailing wife; whether and how Heinz should be punished; and who would be hurt by various actions. People are not asked to critique the ethics of a society wherein someone like Heinz is confronted with such dilemmas.

This bias in the exploration of moral development remains, and the development of reasoning about commutative justice continues to be overlooked. It seems problematic, therefore, to assume that, because students appear to accept the fairness of common classroom situations, they cannot reason about commutative justice. Acting on the assumption that students might be capable of such reasoning, I began to study the development of student beliefs on how fair classrooms ought to be organized.

Because there was no research evidence that students could reason about commutative justice, and because we generally take for granted the ideas that schools ought to exist and ought to consist of tests, contests, and learning situations, I started by checking to see if children distinguish among these different types of classroom situations. If so, children should be able to see the different purposes the situations serve and judge the fairness of educational practices in light of this understanding. Adults know, for example, that peer tutoring might be a fair way to help students learn. They usually think it is an unfair way to organize a test or contest because the goals of deciding what each student knows and determining a winner could not be attained.

Fairness and Conflicting Agendas

To define fairness differently for each type of situation is consistent with the views of philosopher Michael Walzer as he explains them in *Spheres of Justice: A Defense of Pluralism and Equali-*

ty. In a fair classroom, he notes, students and teachers should seek to understand and control the different types of situations that predominate in school. They should ask, for example, whether and how often to take tests, practice the things they know, learn new things, and hold contests. Teachers should not seek only to stretch and shrink children to fit into existing molds. Justice, in Walzer's view, is not a matter of regulating personal conduct, but of defining common educational goals and establishing practices that allow individuals to attain those goals. Negotiating fair practices and coming to agreement about how classrooms ought to be organized makes it possible to coordinate issues of equality and of human diversity.

To adopt Walzer's view, we would have to accept that organizing a fair classroom is an inherently conflict-laden enterprise. Within any classroom there will be a multitude of personalities and goals, and it will always be difficult to simultaneously acknowledge this multitude while preserving equality. Dialogue among those in a particular classroom seems an ideal way to respond to this tension. Yet, to fully communicate, teachers and students must examine their understanding of particular educational goals and of particular classroom practices. Communication might be improved, therefore, if we accept the notion of conflicting agendas, note that teachers and students do not often share an understanding of particular goals, and begin to explicitly negotiate fair practices.

A Map of Students' Fairness Reasoning

To anticipate issues that are likely to be conflict-laden, the following results show several levels of students' reasoning about fairness. First, students' ability to distinguish among the particular needs, features, and goals of tests, contests, and learning situations was explored. Then, the extent to which their fairness beliefs reflected an adultlike understanding of each type of situation was studied. I tested whether students incorporated into their fairness beliefs, the range of issues that adults see as relevant when establishing fair testing and learning practices. Finally, the ways in which children prioritize different types of situations was explored.

Know These Terms

Commutative justice in the classroom involves balancing society's demands for student equality with individual student perceptions of what is fair in particular situations.

Distributive justice looks at how learning opportunities should be made available to students.

Procedural justice deals with the means teachers should use to attain particular goals.

Corrective justice seeks to determine appropriate punishments for students.

Conceptions of Fair Testing and Learning Practices

Interviews with elementary students in grades 1, 3, and 5 showed that children as young as first grade easily distinguished among learning, testing, and contest situations and considered their different goals when judging the fairness of particular classroom practices. Specifically, they judged peer tutoring as a fair way to organize learning, but not tests or contests. They judged interpersonal competition as fair only for contests. Solitary work, in their view, was fair for all three kinds of situations, an idea that is compatible with individualistic notions of how a society might be organized.

Children were what Walzer would call "particularists"—they recognized that the fairness of a particular practice depends on the definition of the situation under consideration. Nevertheless, the table shows that they did not always hold an adultlike understanding of these situations.

For learning situations, adults are typically concerned about ensuring that all students are able to maximize their potentials. Students ages 6-29 were confronted with this and asked to evaluate the fairness of peer tutoring; enrichment for high-ability students; acceleration for high-ability students; conditions where the high-ability students are required to sit quietly and wait for low-ability students; and conditions where low-ability students are not allowed time to finish assignments.

Most students said that peer tutoring was the most fair way to help students learn. Yet, it was only after about age 18 that students commonly considered the range of issues that adults see as important for learning and argued that fair practices should enable everyone to maximize their intellectual potential. Furthermore, children below about age 10 did not mention learning or understanding when justifying their decisions. They still thought peer tutoring was most fair but talked about making sure that everyone has equal piles of work and rewards.

Whereas learning situations are intended to help students comprehend new ideas, tests are designed to assess what students know. Most adults assume that solitary work is essential if teachers are to discover what each student knows. Interviews with students ages 6-12 showed that they fully understood this only after about age 11.

The development of conceptions of fair testing practices followed a pattern different from that found for learning. Whereas adultlike conceptions of fair learning practices emerged at about age 18, adultlike conceptions of fair testing emerged at about age 11. These findings provide further support for Walzer's belief

A Close Look at Student Viewpoints

Approx. ages	Study A Learning (Thorkildsen 1989)	Study B Testing (Thorkildsen 1991)
6-7 years	*Equality of rewards*: Doing schoolwork and gaining rewards is more important than ensuring that slower workers finish the work. Finishing schoolwork or getting rewards is not associated with understanding or learning.	*Fair practices produce equal test scores*: Peer tutoring is more fair than solitary work because it enables everyone to finish and get the same perfect score.
8-9 years	*Equality in the amount of schoolwork completed*: Practices that allow everyone to have equal piles of work are judged fair. Completing an assignment is not yet associated with learning.	*Fair practices produce equal effort and equal test scores*: Fair practices should permit equal scores. Solitary work is the most fair way to test because teachers can see what students know. Yet, peer tutoring is fair because, by helping slower learners work harder, scores will be equal. Equal test scores mean equal attainment regardless of how they are obtained.
10-11 years		*Fair practices produce equal effort, and unequal test scores are possible*: Helping on tests is unfair because students are harmed if they do not learn to think for themselves and remedy their own mistakes. But, if peer tutoring is allowed, students will know the work equally well.
12-13 years 14-16 years	*Equality of learning*: Learning is the most important social good to be considered. Everyone should learn the same material equally well. Practices that allow this are judged fair.	*Fair practices produce equal representation of abilities*: Fair testing requires solitary work. Peer tutoring is cheating. Different scores for fast and slow learners are seen as fair and possible, even if everyone works hard. Helping will not make everyone equal in ability.
16-18 years	*Equity and equality of learning are partially differentiated*: Students vacillate between endorsing practices that promote simple equality of learning (as in Level 3) and equity of learning (as in Level 5), wherein abler students learn more.	
18+ years	*Equity of learning*: Judged most fair are meritocratic systems, where those capable of learning more do so.	

that individuals construct an understanding of each type of situation and a corresponding conception of fair societal practices.

Although these generalizations are possible, teachers will probably find that their students are sometimes confused about the meaning of particular situations. Primary teachers, for example, might be surprised to find that children are confused about when copying is legitimate. These youngsters have difficulty distinguishing between copying to learn new words and copying to complete a spelling test. Furthermore, it is difficult for children (and adults) to determine whether workbooks and

worksheets should be viewed as tests or as opportunities to learn. (These discoveries are evident in Nicholls and Hazzard's *Education as Adventure: Lessons from the Second Grade.*) It seems likely that additional confusing and ambiguous situations will come up if teachers and students regularly engage in discussions about fairness.

Situation Prioritization

Questions about students' conceptions of fairness involve matters of procedural and distributive justice that educators often consider. Organizing tests so that teachers can find out what students know involves procedural justice. Helping high- and low-ability students learn seems to involve both distributive and procedural justice. So far, in other words, we have not directly explored students' commutative justice reasoning. Yet, we have learned that students and teachers do not always share the same understanding of common classroom activities. For certain moral and intellectual purposes, we should be cautious about assuming that adultlike conceptions are superior conceptions. Discussions of how to prioritize various types of classroom situations—matters of commutative justice—can be illuminating for adults as well as children, but only if teachers allow students to comfortably share their ideas.

Evaluating matters of commutative justice requires students to coordinate a variety of goals and values to determine which types of situations should predominate in school and what type of community to build there. To simply ask students what a fair community ought to look like is to invite a level of abstraction that would be difficult to interpret. How can we ensure at least a rudimentary level of shared meaning or common basis for understanding the alternative visions that are likely to be put forth?

One way is to ask students how often a particular type of situation ought to occur. Such a question offers a level of concreteness from which we can make more abstract generalizations about how school ought to be organized. I tried this, for example, by asking students ages 7-12 how much testing is fair in school. To respond to this question, they needed some understanding of the nature and purpose of testing, but they also asserted their own values and weighed the importance of various types of classroom situations (e.g., learning, free time, tests).

In individual interviews, two groups of students evaluated the fairness of different types and quantities of tests ranging from daily tests to replacing tests with class discussions. The students attended schools with two different teaching philosophies—views that seemed to have some impact on how the students prioritized testing.

Montessori Classrooms

One school was a public Montessori school in which students usually spent their time doing active inquiry. They had no textbooks or workbooks, nor did they complete worksheets. Their only experience with tests were state-mandated standardized achievement tests taken in grades 2, 3, and 5. For the most part, the students received all evaluative feedback either verbally or in the form of written comments. The dominant position among these students was that tests interfere with learning and should be used infrequently, if at all. The students typically chose as most fair one standardized test a year or no tests. Some supported their view by illustrating what students might accomplish in place of doing tests. Others talked about the shortcomings of having too many tests. When choosing no tests as fair, these students were not trying to avoid evaluation. They saw tests as serving only to create a paper trail of their mistakes. As one student put it, "The teacher could just ask them questions. Then if they make mistakes, the teacher could correct them and they won't feel bad. Here [in unit tests] they write their mistakes down and it's hard to forget that you made them . . . . It's hard to fix them." Those who selected one standardized test differed only in that they preferred to keep evaluation private. They worried that students would feel embarrassed in front of their friends if they didn't know the answer in a class discussion.

Traditional Classrooms

The other schools were traditionally organized neighborhood schools where direct instruction was state mandated and systematically implemented. During specific parts of each school day, all interruptions ceased and children engaged in this ritualized form of learning. Lessons began with a review of previously covered material. Teachers then presented new material, and children engaged in guided practice. Feedback and corrections immediately followed. The cycle was repeated until everyone seemed to master the material. Then, when ready, children engaged in independent practice. These lessons emphasized the attainment of correct answers rather than self-expression. Worksheets and tests were frequently used.

The common position among students in these schools was consistent with the view that testing is learning. They argued that having daily quizzes, biweekly unit tests, and a standardized test at the end of the year is most fair. They gave reasons like, "If they do tests, they are learning what they need to for the next grade." They said the more tests students take, the more they learn. They did not suggest that students should study or prepare for tests. To them, the only students who learn take frequent tests and do their own work.

Conformity, with Exceptions

In each type of school, many of the students interviewed said that the amount and type of testing they experienced was most fair. In the Montessori school, where correct answers were not emphasized, students said that tests interfered with learning. In the traditional schools, where learning activities were organized in a testlike fashion, students said that teachers should give frequent tests. These findings suggest that teachers who engage

students in discussion about how school ought to be organized are unlikely to be faced with open rebellion against their current practices.

Nevertheless, within each of these schools, a sizable number of students thought that the current practices were not as fair as other alternatives. Some students in the Montessori school held positions consistent with the dominant view held by those in the traditional schools and vice versa.

Furthermore, some Montessori students joined those in the traditional schools in taking a more balanced position that testing informs learning. These students asserted that having tests frequently, but not daily, would keep them on their toes and help them know what was important to study. They usually chose to have either daily quizzes or unit tests, arguing that one or no tests would not help students discover what they need to learn. They also said that having all the different tests would be too many, and that students would not have time to study.

A small number of students in both types of schools asserted a fourth position: that teachers should not evaluate students and that all testing is unfair. They often worried that tests would be too hard and that students would be punished (e.g., would flunk or have privileges taken away) if they did poorly.

This range of positions suggests that teachers and students could benefit from discussions of how school ought to be organized. Public discussions about the diversity of opinions that are likely in a single classroom could lead students and teachers to a deeper understanding of one another.

Insights from One Classroom

Deeper understanding, however, will probably not eliminate conflict. In classrooms where commutative justice is a central concern, negotiations will be constant. A group of fourth and fifth graders, their teacher Candace Jordan, and I discovered this while trying to improve cooperative learning.

Candace regularly engages her students in democratic decision making about fair and effective ways to organize the classroom. When we began our collaboration, Candace's students, like most researchers who study moral development, assumed that fairness must involve matters of personal conduct—following school rules. Through a variety of activities, we let the students know that we were genuinely interested in their critiques of the practices that lead to such rules. Then, with the students' consent, we changed the ways in which they were allowed to collaborate and asked the children to critique their experiences under both the old and new systems. In doing so, we discovered many problems with the cooperative learning practices established by researchers. Some actually hindered the development of beneficial collaborative relationships.

Assigning students to groups, for example, put excessive restraints on the spontaneous creativity that normally dominated Candace's room. Good ideas could not spread as easily throughout the group because students were less free to approach nongroup members who might otherwise help them. We introduced this practice with the hope that students who were becoming socially isolated could be better integrated into group activities. Yet, in doing so, power struggles became the dominant focus of everyone in the room. We had underestimated the importance of personal skill, friendship, and trust to genuine collaboration.

The children also surprised us by inventing a process for resolving personal conflicts in nonthreatening and more moral ways. Placing a tape recorder in a quiet corner of the room, we provoked them to reflect and discuss the fairness and effectiveness of the ways in which they collaborate. They surprised us by using this style of discourse to raise sensitive issues and resolve personal conflicts. They showed us what Dewey meant when he said:

> Democracy is a way of life controlled by personal faith in personal day-to-day working with others. . . . To take as far as possible every conflict which arises—and they are bound to arise—out of the atmosphere and medium of force, of violence as a means of settlement, into that of discussion of intelligence, is to treat those who disagree—even profoundly—with us as those from whom we may learn, and in so far as friends. (225-26)

Angela and Latoya, for example, were having difficulty collaborating and talked it out into the tape

(continued on page 62)

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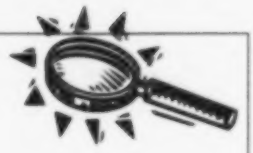

Grade Level _____

Town and State _____

Which Learning and Testing Practices Are Fair?

As part of your discussion on commutative justice, see how your class completes this anonymous survey. Volunteers can analyze and report the results. Decide whether the findings suggest that your class might benefit from reexamining the ways in which you learn and take tests.

Dr. Thorkildsen is interested in your results! Once you've finished the survey, please take a moment to mail your questionnaires to us along with your analysis. (We will need both!) The deadline is December 31, 1994. If the response is strong, we'll compile the results and publish them in *Update* next year.

Address your package to:
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1. Peer (student) tutoring during learning sessions results in which of the following outcomes? Check one or more.
   ___ a. increased learning for the person being helped
   ___ b. increased learning for the person helping
   ___ c. a and b
   ___ d. a waste of time for both students
   ___ e. other _____

2. If peer tutoring is allowed *during* a test, whose knowledge will the score reflect? Check one or more.
   ___ a. the knowledge of the person being helped
   ___ b. the knowledge of the person helping
   ___ c. a and b
   ___ d. no one's knowledge
   ___ e. other _____

3. Check the learning methods you feel are fair for high-ability students. Star the fairest method.
   ___ a. additional learning activities
   ___ b. harder learning activities
   ___ c. the same learning activities as for other students
   ___ d. shorter time limits for completing activities
   ___ e. special advanced tutoring
   ___ f. other _____

4. Check the learning methods you feel are fair for all other students. Star the fairest method.
   ___ a. additional learning activities
   ___ b. fewer learning activities
   ___ c. easier learning activities
   ___ d. longer time limits for completing activities
   ___ e. peer tutoring
   ___ f. other _____

5. Are tests beneficial to learning? Circle one. Y N If yes, check the kinds of tests that are beneficial. Star the most beneficial kind of test.
   ___ a. daily quizzes
   ___ b. weekly tests
   ___ c. end of unit tests
   ___ d. standardized tests
   ___ e. other _____

6. Check the testing methods you feel are fair for high-ability students. Star the fairest method.
   ___ a. additional tests
   ___ b. harder tests
   ___ c. the same tests as for other students
   ___ d. shorter time limits for tests
   ___ e. use of books and notes during tests
   ___ f. other _____

7. Check the testing methods you feel are fair for all other students. Star the fairest method.
   ___ a. additional tests
   ___ b. easier tests
   ___ c. the same tests as for high-ability students
   ___ d. longer time limits for tests
   ___ e. tutoring during tests
   ___ f. other _____

8. Do you think we should have schools? Circle one. Y N Why or why not?_____

_____

9. What should students do in school? _____

_____

10. Do learning methods influence test scores? Circle one. Y N If yes, how? _____

_____

11. If you could change one learning method, what would it be? _____

_____

12. If you could change one testing method, what would it be?_____

_____

recorder. Angela thought that Latoya had not been doing her share of the work. Here, she challenges Latoya: "[When collaborating], the person has to see that it's OK to work with that person. I usually pick the right people. . . . I picked a new partner [Latoya] now, and she's NOT working very nicely, but I'm getting her good. Before she was not working very good, but I've gotten her on the horsey and now we're taking a ride!"

Latoya responded to this apparent criticism cheerfully, explaining her actions under the pretense of discussing what makes a good collaborator. "If you are stuck on something, and you're working with somebody, the person that knows it may help you with it. Like my friend [Angela]—she helps me with a lot of stuff, and I think it's really nice for her to do that."

"Thank you, Latoya," said Angela with an audible sigh of relief. "I think I have been helping her a lot, too. But, I think the most thing she has been helping me about is being my friend."

In the process of negotiating a fair way to collaborate, these girls came away from a difficult conflict with a deeper understanding of each other. They could not help but resort to complaints about personal conduct. Yet, by discussing what makes a good collaborator, they resolved their differences in a way that was not personally threatening to either. Their subtlety and honesty are impressive; but more important, they worked through their conflict rather than avoiding it by choosing another collaborator. In clarifying their relationship, they established a form of equality—both gained something from collaboration. At the same time, they learned to respect their unique characteristics and to see the limits of their ability to contribute to the task.

In a community of two people, it seems easy to consider commutative justice. How to make commutative-justice discussions a regular feature of classroom life, and to coordinate the multiple perspectives of all students and teachers, is, of course, a far greater challenge. □

From Crow Dog to Sacred Clowns: Navajo Mysteries by Tony Hillerman

Gayle Mertz
deana harragarra waters

At first glance, one would not identify Tony Hillerman's Navajo mysteries as law-related education text. Reading any one of his books, however, belies first impressions and reveals all the elements of an engaging LRE lesson.

One thing to be learned about Indians is that history is deeply entrenched in their contemporary lives. Contemporary Indian law is no exception. While the Brule Sioux and Navajo cultures differ, the relationship of tribal to federal law in both cases is built on the same foundation. To illustrate this point, examine the landmark U.S. Supreme Court case *Ex parte Crow Dog*—powerful name, powerful case. On August 5, 1881, Spotted Tail, a Brule Sioux chief, was murdered by Crow Dog, whom he had appointed captain of the Indian police. Following Brule Sioux tribal law, the tribal council ordered an end to the trouble and sent peacemakers to both the Crow Dog and Spotted Tail families. Spotted Tail's and Crow Dog's relatives talked over the damages and agreed that Crow Dog's family should promptly pay Spotted Tail's people $600, eight horses, and one blanket. Thus, Brule Sioux tribal law effectively and speedily redressed Spotted Tail's killing and restored tribal harmony and fellowship.

The story does not end here. Federal officials labeled the Brule Sioux resolution "savage" and the tribe "people without law." Thus, Crow Dog was later tried in the Dakota Territorial Court and sentenced to death by hanging for this crime. His conviction was reversed by the Supreme Court, which held that the Brule Sioux had a sovereign right to their own law, leaving the United States with no jurisdiction. Perhaps this event was the impetus for the eventual passage of the Major Crimes Act of 1885, which expressly provides for federal jurisdiction over major felonies occurring in Indian country.

This case is an example of tribal law's providing a higher measure of justice than American justice did. Brule Sioux tribal law was based on restitution and the importance of continuity of the community as a whole in the furtherance of tradition and custom. Hillerman explores the issues addressed in *Crow Dog*: tribal sovereignty, assimilation, criminal jurisdiction, restitution, reparation, and restorative justice. At the top of the list of issues usually addressed in a murder mystery, but rarely mentioned in any of Tony Hillerman's stories, is punishment.

Opening a Hillerman book, however, is nothing like opening a law book. It is more like opening a combination travel brochure, *National Geographic*, and spine-tingling mystery. The reader is immediately and magically transported to a land that is simultaneously exotic and ordinary; beautiful and harsh; simple and complex. This land is the Navajo Nation. Through the eyes, ears, and hearts of two Navajo tribal police, the reader is introduced to Navajo culture (and, to a lesser degree, those of the Hopi, Zuni, and northern Pueblo).

Each of Hillerman's 12 books finds officer Jim Chee and Lieutenant Joe Leaphorn investigating an unusual death. Their investigations take them beyond a search for material clues and the opportunity to arrest a defendant. Woven as clues into each of these stories are threads of ancient and contemporary Navajo culture. Pulling the wrong thread at the wrong time may expose cultural or spiritual secrets that are meant to be undisturbed. The officers must cautiously determine when and how to unravel the mystery, and when to leave these threads untouched out of respect for cultural taboos.

As the stories unfold, the reader gains a better understanding of what legal scholars refer to as "customary law" in debating *Crow Dog* and subsequent cases. Chee and Leaphorn's knowledge of traditional Navajo marriage, family, and clan relationships, the distribution of property, and social and political organizations assists them in observing Navajo behavior, uncovering and connecting esoteric clues, and explaining their method and reasoning to confused *Belaganas* (Anglos). The patience and respect with which they interact with people, other living creatures, and inanimate objects teach the reader about Navajo relationships with time and the environment, and a new outlook on the meaning of justice.

Hillerman does not stereotype Navajos or characters from other cultures, but introduces a host of individuals who have diverse and complicated relationships with Navajo culture: Chee, the younger officer, aspires to become a *yataalii* (a shaman), a goal that often puts him in philosophical conflict with his employment in law enforcement; Janet Pete, a half-Navajo public defender, grew up in the city and moved to the Navajo Nation as a cultural neophyte; numerous non-Navajo characters exhibit considerable knowledge of the culture, but taboos limit them from becoming too intimate with a culture they were not born into. It is through the experience, or inexperience, of these characters that the reader becomes acquainted with the subtleties of *hozho* (or *horzo*).

Try as Chee may, he is unable to explain *hozho*'s meaning. His best attempts to translate it into English continually bring him back to the English words *harmony* and *beauty*. However, he is not using these words

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to describe music or scenery, but perhaps the kind of justice the Brule Sioux accomplished in the Crow Dog incident. In Hillerman's most recent book, *Sacred Clowns*, Chee explains that " . . . we're dealing with justice, just retribution. That's a religious concept, really. We'll say the tribal cop is sort of religious. He honors his people's traditional ways. He has been taught another notion of justice . . . . That way you restore *hozho*." In each of Hillerman's books, Chee and other characters strive to reconcile the incongruity between traditional U.S. justice and traditional Navajo justice: the difference between punishment and restoration. In following Chee's quests, the reader learns that U.S. justice is defined by laws and judges; Navajo justice, by elders and shaman.

Hillerman's fidelity to Navajo culture and religion has won him an honored place in Navajo society. In 1987, he became the only person to receive the "special friend of the *Dineh*" award "for authentically portraying the strength and dignity of traditional Navajo culture." (The Navajo use the word *Dineh* to describe themselves.) His books are widely read by the Navajo and are required reading in many Navajo schools.

Suspenseful mystery, multicultural perspectives, and provocative exploration of law-related issues are intertwined in each of Hillerman's books. His writing skill is equal to the physical beauty of the area that he writes about, and the sensitivity and knowledge that he shares about a people who are often misunderstood. Hillerman paints pictures whereby America can gain a foundation for enriching its legal tradition by observing, respecting, and calling upon the legal traditions of its native peoples, the Indians. □

For Teachers and Students: A Good Book About America's First Woman Lawyer

Myra Bradwell, a 19th-century Chicagoan, was prohibited from practicing law—twice by the Illinois Supreme Court and then by the U.S. Supreme Court. Why? Because she was a woman.

But Bradwell didn't scurry back to her kitchen and her family. Instead, she began a quarter-century career as publisher and editor in chief of the *Chicago Legal News*, for two decades the country's most widely circulated legal publication, and her vehicle for promoting expanded rights for women and legal profession reforms. Bradwell's story is recounted by Jane M. Friedman in *America's First Woman Lawyer: The Biography of Myra Bradwell* (Prometheus Books), published in 1993.

Despite Bradwell's impact on law and women's rights in the mid-1800s, little had been written about her until the publication of this book. In it, Friedman, a law professor at Wayne State University Law School in Detroit, chronicles Bradwell's activities within the Chicago legal community, her advocacy of women seeking to practice law and enter other professions, and the role of the *Chicago Legal News* in improving lawyer's access to information about legislative actions and court decisions.

Bradwell began to study law with her husband James in 1852, when he was a law student himself. She wished to help him in what became his busy practice. She took and passed the bar exam in 1869. The only woman who passed a state bar before her, Arabella Mansfield, passed the Iowa bar six weeks earlier but returned immediately to teaching English and had no further professional involvement with the law.

Bradwell's inability to work increased her motivation to funnel her talents into legal journalism. By 1872, when Illinois passed a law making it possible for women to practice any profession—a law Bradwell drafted and lobbied through the state legislature—"She was so immersed in her new profession that she didn't want to bother [seeking admission to the bar]," says Friedman.

Bradwell's paper became the "paper of record" for the publication of statutes enacted by the Illinois legislature and, later, for printing judicial decisions by the Supreme Court and all the lower federal courts in the country. This tactic was a shrewd business approach that ensured the commercial success of the *Chicago Legal News* and opened the door for Bradwell's use of her publication as a "bully pulpit" for her views.

Through the newspaper and her own actions, Bradwell championed a wide range of causes. She urged better legal education and the establishment of a Chicago bar association (which she was never invited to join). She lobbied against the widespread practice of bribing jurors and exposed the unscrupulous practices of corrupt judges. Many issues she addressed have modern counterparts, such as judges' salaries, courtroom conditions, and oversight of lawyers' misconduct by professional organizations.

Bradwell was a tireless fighter for the rights of women and the mentally ill. She campaigned to open law school admission to women and to allow them to practice, taking up the causes of several women who faced obstacles in their efforts to become lawyers. She was instrumental in obtaining the release of Mary Todd Lincoln, widow of the assassinated president, from a mental asylum where she had been unjustly confined by her son. Bradwell was involved in efforts to permit women to hold public office even before they were enfranchised. And she was active in the suffrage movement, although her contributions were not recorded for history, most likely because of long-standing disagreements with Susan B. Anthony, who as a result left Bradwell out of her accounts of the movement.

To find out more about *America's First Woman Lawyer*, see the April 1994 American Bar Association's *Student Lawyer* (5-6). Or, better yet, see if your local library or bookstore has a copy. □

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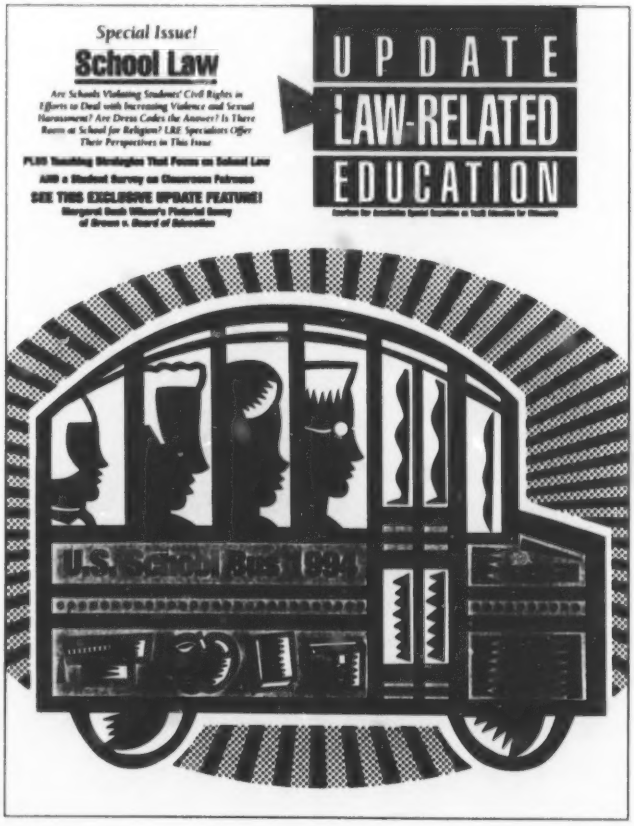

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